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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

PORTLAND HOUSING AUTHORITY,

Petitioner

v.

JOHN DOE and JANE DOE,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MAINE

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QUESTIONS PRESENTED

I.

Do federal laws requiring a local public housing authority to provide decent, safe, and sanitary housing to its residents preempt a state law which voids a lease provision banning the possession or display of a firearm on public housing authority property when that lease provision was adopted by the local housing authority to combat unsafe and insecure conditions specific and peculiar to the local housing project?

II.

Where federal law (including the Housing Act of 1937 and the Department of Housing and Urban Development regulations) expressly vests "the maximum amount of responsibility" in local public housing authorities to make management decisions in response to local housing needs and neighborhood conditions, does a state law prohibiting a public housing authority from banning its tenants from the display and possession of firearms frustrate the purposes and objectives of the federal regulations such that the federal law preempts the state law when applied to public housing authorities?

PARTIES

The parties to these proceedings are the same as those to the proceeding below. All of the parties in the Maine Supreme Judicial Court are listed in the caption.

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v.

JOHN DOE and JANE DOE,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MAINE

The Portland Housing Authority petitions for a writ of certiorari to review the judgment and opinion of the Maine Supreme Judicial Court in this case.

OPINIONS BELOW

The decision of the Maine Supreme Judicial Court (App. 2) is not yet reported. The decision of the

Cumberland County Superior Court (App. 18) is not reported.

STATEMENT OF JURISDICTION

The Opinion and Order of the Maine Supreme Judicial Court, the highest court in the state of Maine, was entered on April 4, 1995. That judgment voided a Portland Housing Authority lease provision made in accordance with affirmative obligations imposed on public housing authorities by the United States Housing Act of 1937 (42 U.S.C. § 1404 et seq.) to maintain "decent, safe, and sanitary housing." The Maine Supreme Judicial Court ruled that the Housing Act and applicable federal regulations did not preempt a state law which, when applied to a housing authority, prohibits the housing authority from contracting with its tenants to ban the possession and/or display of firearms on the premises of the housing authority.

The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. §1257(a) because the validity of a state law is drawn into question on the grounds of its being repugnant to the Constitution, treaties or laws of the United States and, correspondingly, a title, right, privilege, or immunity is claimed under authority exercised pursuant to the Constitution and statutes of the United States.

CONSTITUTIONAL, STATUTORY, AND CONTRACTUAL PROVISIONS INVOLVED

The Constitutional provision involved is the Supremacy Clause, Art. VI, par. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The statutory provisions involved are the Housing Act of 1937 (42 U.S.C.A. § 1404 *et seq.*) (West 1994 & Supp. 1995) (App. 63-66), and ME. REV. STAT. ANN. tit. 25 § 2011 (West Supp. 1994) (App. 73). The regulatory provisions involved are the Department of Housing and Urban Development ("HUD") Rules and Regulations 24 C.F.R. § § 960.204, 966.4 (April, 1994) (App. 67-69). This case also involves provisions of the Consolidated Annual Contributions Contract ("CACC"), the agreement between the Portland Housing Authority and the United States (CACC Part I §§ 4, 6 and Part II §§ 101, 201, 203(B)) (App. 70-72).

STATEMENT OF THE CASE

This petition for a writ of certiorari to the Maine Supreme Judicial Court is based on that Court's determination that a state law which prohibits any political subdivision of the State from regulating firearms (hereinafter, the "Maine Firearm Preemption Statute" or "Section 2011") rendered invalid a provision in the lease of the Portland Housing Authority ("PHA") forbidding a tenant's possession and/or display of a firearm on PHA premises. That Court ruled that the Maine Firearm Preemption Statute, which strips away the PHA's power to regulate firearms in its particular locality, is not preempted by federal laws which vest maximum authority in local housing authorities to administer their housing

programs so as to achieve decent, safe, and sanitary dwellings for their residents.

The PHA is a "public body corporate and politic" created by Resolution of Portland's City Council pursuant to statutory authorization conferred by P.L. 1943, ch. 260, now revised and codified as ME. REV. STAT. ANN. tit. 30-A, §§ 4721, 4702(2) (Supp. 1994) (App. 31). The PHA receives subsidies from the federal government pursuant to, and as regulated by, the Housing Act of 1937, 42 U.S.C.A. 1404 *et seq.* (West 1994 & Supp. 1995) ("the Housing Act") (App. 31).

Charged with the responsibility of providing safe, decent, sanitary, and affordable housing for persons of low income, the PHA manages, operates and supervises developments in the City of Portland. About 2,700 persons live in the 1,024 dwelling accommodations. The developments are of two basic types: (1) apartment-style dwellings for the elderly and the physical and mentally disabled, including persons with substance abuse problems; and (2) housing for families and persons living individually (App. 31).

In the early 1970's the PHA received numerous complaints regarding unsafe conditions at its various housing projects, including arson, vandalism, gang rowdyism, acts of assault and intimidation, and possession of firearms by tenants. The problems were so severe that persons rendering essential services (e.g., postal agents, social service workers, and firefighters) refused to enter the premises without a police escort (App. 32). In response, the PHA Commissioners passed a resolution on April 17, 1975, forbidding tenants to "own, harbor, conceal, keep or allow any gun, shotgun, pistol, rifle or firearm of any type in or around his/her

premises or the property of the Portland Housing Authority at any time." The following month the Commissioners deleted the word "own" from the resolution (App. 32). The resolution was implemented through the adoption of a lease provision which reads:

> The Tenant's possession of or display of a firearm upon the premises is prohibited. A violation of this Section is grounds for automatic termination of this Lease. (App. 3, n. 3)

In December 1992, plaintiffs-respondents (hereinafter "the Does"), residents of public housing since 1981, challenged this provision of the lease in the Cumberland County Superior Court, alleging that the firearms ban deprived them of their rights under the Maine Constitution (App. 31-32). The Cumberland County Superior Court (Sidney W. Wernick, Active Retired Justice of the Maine Supreme Judicial Court, sitting as the Superior Court) held a bench trial on December 13 and 14, 1993.

After trial, and for the first time in the litigation, the Does argued that the Maine Firearm Preemption Statute voided the lease provision, and superseded the authority of the PHA to regulate firearm possession. Section 2011 reads in part:

> No political subdivision of the State. . . may adopt any order, ordinance, rule, or regulation concerning the sale, purchase, purchase delay, transfer, ownership, use, possession, bearing, transportation, licensing, permitting, registration, taxation or any other matter pertaining to firearms. . . .

(See App. 73 for the full text of Section 2011). The trial justice called counsel to a chambers conference to discuss the state preemption issue. At that chambers conference, and then in its memorandum of law dated December 22, 1993 opposing the Does' state preemption argument, the PHA argued that federal law preempts Section 2011 as applied to the PHA (App. 49).

In its Opinion and Order dated December 29, 1993, the Cumberland County Superior Court declared that Section 2011 did not apply to housing authorities and that the firearms ban did not violate the Does' rights under the Maine Constitution (App. 18). The court found that the lease provision ban on the possession of firearms was rationally related to the PHA's legitimate purposes of :

A. preventing on PHA premises

(1) escalation of crime and violence,
(2) accidental shooting, especially by, and of, children,
(3) enhanced seriousness of injury occurring in domestic violence; and

B. promoting an atmosphere and feeling of safety and security amongst the PHA tenants.

(App. 33). The Superior Court did not address the PHA's federal preemption argument, having determined that the Maine Firearm Preemption Statute did not apply to the PHA.

The Maine Supreme Judicial Court vacated the lower court's ruling on April 4, 1995 and, without considering the Maine constitutional issues raised by the Does, remanded the case for a judgment declaring the lease

provision invalid (App. 14). The Maine Supreme Judicial Court determined that Section 2011 governed public housing authorities and, further, that Section 2011 did not conflict with the purposes and objectives of the Housing Act or other federal regulations and was therefore not preempted by federal law. The decision contained no discussion of the history or objectives of the Housing Act of 1937 (App. 12-14; 57-62).

REASONS FOR GRANTING THE WRIT

I. THE MAINE SUPREME JUDICIAL COURT FAILED TO RECOGNIZE THAT THE MAINE FIREARM PREEMPTION STATUTE CONFLICTS WITH THE STATED POLICY OF THE NATIONAL HOUSING ACT OF 1937 AND OTHER FEDERAL HOUSING LAWS.

This Court has determined that a conflict exists between a state and federal law when compliance with both the state and federal law is impossible or when the state law "stands as an obstacle" to the accomplishment and execution of the full purposes and objectives of Congress. *Mich. Canners & Freezers Ass'n, Inc. v. Agr. Marketing & Barg. Bd.*, 467 U.S. 461, 469, 104 S. Ct. 2518, 81 L. Ed. 2d 399 (1984) (citations omitted). The stated policy of the Housing Act is to provide federal funds to assist in the provision of "decent, safe, and sanitary dwellings for families of lower income and. . . to vest in local public housing agencies the maximum amount of responsibility in the administration of their housing programs." 42 U.S.C.A. § 1437 (West 1994). The decision of the Maine Supreme Judicial Court to apply Section 2011 to municipal housing authorities frustrates the ability of the PHA to provide safe housing and to exercise maximum discretion in managing its

properties. Under this ruling, the PHA can no longer comply with the full purposes and objectives of Congress as described in the Housing Act.

Important public policy concerns underlie Congress' grant of authority to local housing agencies to provide safe and secure housing for their tenants. The record in this case shows that the communities of the PHA are more prone to criminal and violent activity than are the surrounding neighborhoods of Portland (App. 32, 35-36). In addition to his testimony regarding the severe problems which led to the ban on firearms in 1975, Peter Howe, the manager of the PHA, testified that presently each of Portland's ten public housing developments faces serious safety and security problems which are complicated by the design of the buildings and the characteristics of its tenants. Many residents of PHA developments for the elderly or disabled suffer from mental disabilities or substance abuse problems. The record shows that the communal living structure of these developments leaves elderly tenants vulnerable to episodes of threatening and uncontrolled behavior that can lead to assault and vandalism (App. 36).

Developments for family residents are equally susceptible to violence and crime due to the density of the living arrangements. Mr. Howe described large numbers of youths living in cramped quarters who often engage in acts of gang rowdyism and intimidation (App. 32, 35) (Tr. 38). The crowding also promotes volatility in the relationships between tenants. Incidents that might otherwise remain isolated are likely to erupt into general violence and lead to longstanding feuds among residents (App. 35). The Portland police consider these communities so explosive that they carry beepers to

respond quickly to any incidents occurring on the PHA premises (App. 35).

The record further shows that the presence of firearms aggravates the dangers to the health, safety, and welfare of the PHA tenants (App. 36). Professor Stephen Teret of John Hopkins University, an expert in firearm injury prevention and public health, testified that the availability of a firearm in the home increases the risk that residents will suffer serious injury or death. This risk is especially high in situations involving alcohol abuse (Tr. 134), crowded living conditions (Tr. 135) and low income communities (Tr. 135). Mr. Teret testified that a ban on the possession and/or display of firearms would result in a decrease in the number and severity of gun related injuries in a community in which assaultive violence was endemic (Tr. 139). The Superior Court described Mr. Teret's testimony as credible and reliable (App. 36).

Testimony by Portland police officers confirmed that the amount of crime, alcohol abuse, and domestic violence in the PHA developments substantially exceeds that of any other part of the city (Tr. 179, 250). Portland Chief of Police Michael Chitwood and Detective Mark Dion testified that police are frequently called to the developments to investigate assaults, domestic assault, rape, robbery, burglary, theft, criminal threatening, and criminal mischief (Tr. 178, 249-50). Chief Chitwood testified, however, that the incidence of firearm related assaults, burglaries and injuries is relatively low in the public housing communities (Tr. at 189-91). Both he and Detective Dion stated that in their opinion the firearms ban has had a positive effect on controlling crime and reducing levels of violence within the housing authority

developments (Tr. at 191, 258-61). *(See also* App. 35-37).

Portland, Maine, is not alone in its experience. Public housing developments across the country face similar problems with crime and violence. *See, e.g., Richmond Tenants Org. v. Richmond Redevelopment and Hous. Auth.*, 751 F. Supp. 1204, 1206, 1211 (E.D. Va. 1990) (one third of all city firearm deaths occur in the housing developments); *Spence v. Gormley*, 387 Mass. 258, 439 N.E. 2d 741, 743-44 (1982) (tenants evicted for participating in firebombing of premises and assaulting housing authority employee); *Henry Horner Mothers Guild v. Chicago Hous. Auth.*, 780 F. Supp. 511, 513 (N.D. Ill. 1991) (housing units overrun with vandals, trespassers, and drug dealers). Public housing agencies in Virginia and Illinois have responded to escalating crime by instituting restrictions on firearm possession in their leases. *See Richmond Tenants Org.*, 751 F. Supp. at 1211. The state legislature in Virginia, as in Maine, subsequently passed a law preempting the ability of local public housing agencies to regulate firearms in their leases with tenants. *See* VA. CODE ANN. § 55-248.9(A)(6) (Michie 1994)[1].

At issue is the ability of the local housing authorities to contract with their tenants to remove serious threats to

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1. The Virginia statute reads in part, "A rental agreement shall not contain provisions that the tenant: . . .agrees as a condition of tenancy in public housing to a prohibition or restriction of any lawful possession of a firearm within individual rental units unless required by federal law or regulation." VA. CODE ANN. § 55-248.9(A)(6) (Michie 1994).

the tenants' safety and well-being.[2] Federal law imparts the maximum authority available to local housing authorities to manage its facilities in light of local concerns. The Maine Firearm Preemption Statute strips that authority away from the local housing authority when dealing with crucial safety issues concerning firearms. The state legislature does not possess the familiarity with everyday conditions in the projects, nor the flexibility to respond quickly to changing circumstances necessary to govern individual housing authorities. Public housing agencies, through their contracts with the United States government, bear a direct responsibility for guarding the tenants' safety, health and well-being (App. xx). Local housing authorities are also more familiar with and consequently more sensitive to the needs of the tenants. Final decisions about what may be incorporated into a housing authority lease should therefore be left to HUD and the local public housing agencies as Congress intended and set out in the Housing Act.

A. The Maine Firearm Preemption Statute, inhibits the PHA's ability to comply with the Housing Act's requirement that public housing authorities maintain their developments in a decent, safe, and sanitary condition.

As stated above, the overriding purpose of the Housing Act is to assist in the provision of safe and sanitary dwellings for families of lower-income. In other housing acts, Congress has stated that "an integral part of successfully providing decent, safe, and sanitary dwellings for low-income persons is to insure that the

2. The record here shows that eighty three percent of the residents of the PHA support a continuation of the firearms ban in the PHA lease (App. xx).

housing is secure." Public Housing Security Demonstration Act of 1978, Pub. L. 95-557, Title II, § 207(b)(1)(D), 92 Stat. 2093 (1978) (codified as amended at 12 U.S.C.A. § 1701z-6 (West 1994)). The Housing Act specifically requires that public housing agencies use management practices "designed to assure that satisfactory standards of tenant security. . . are formulated and that the public housing agency . . . enforces those standards fully and effectively." 42 U.S.C.A. § 1437d(c)(4)(C) (West 1994). Furthermore, Congress mandates that "[e]ach public housing agency shall utilize leases which (1) do not contain unreasonable terms and conditions; and (2) obligate the public housing agency to maintain the project in decent, safe, and sanitary condition" 42 U.S.C.A. § 1437d(l),(1),(2) (West 1994). The statute provides that the housing authority must terminate tenancy for "any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants, or any drug-related criminal activity. . ." 42 U.S.C.A. § 1437d(l)(5) (West 1994).

Congress' desire to provide safe housing means more than mere structural soundness, but also applies to tenant conduct, and the ability to regulate tenant conduct to insure the safety of those residing within the community. *See, e.g.*, 24 C.F.R. §§ 960.204(b)(2) (April, 1994) (policies of housing authorities must preclude admission to applicants whose habits and practices may have a detrimental effect on the project environment) (App. 67); 966.4(e)(1), 966.4(f)(11) & (12) (April, 1994) (leases shall obligate tenant to act in a manner conducive to maintaining a safe and peaceful project) (App. 68-69). The phrase "decent, safe, and sanitary" has been defined to include not only the structural soundness of facilities but also freedom from violence. *E.g.*, *P.L.C. v. Hous.*

Auth. of Warren County, 588 F. Supp. 961, 965-66 (W.D. Pa. 1984) (by moving into government-controlled living quarters, tenant had a right of expectation of freedom from bodily harm); *Spence v. Gormley*, 439 N.E.2d at 744-45 (tenant's violent conduct found to be a threat to the safety of other tenants and therefore an appropriate grounds for eviction); *Velez v. Cisneros*, 850 F. Supp. 1257, 1262-63 (E.D. Pa. 1994) (presence of vandals, drug-dealing, and atmosphere of violence contribute to finding of severe deterioration and basic health and safety problems in housing project); *Boston Hous. Auth. v. Guirola*, 410 Mass. 820, 575 N.E.2d 1100, 1105 (1991) (manager's concern for the safety of other tenants resulting from the discovery of a lethal weapon in one of the units is entirely reasonable and an appropriate grounds for search and eviction).

Under its agreements with the United States (the "CACC"), the PHA is contractually mandated by the federal government to operate its projects in compliance with federal law. CACC, Part I, § 4. The PHA must use federal funds it receives to provide safe and decent housing to its residents. CACC, Part I, § 6. Section 201 of Part II of the CACC provides:

> The Local Authority [the PHA] shall at all times operate each project (1) solely for the purpose of providing decent, safe, and sanitary dwellings (including necessary appurtenances thereto) within the financial reach of Families of Low Income, (2) in such manner as to promote serviceability, efficiency, economy, and stability, and (3) in such manner as to achieve the economic and social well-being of the tenants thereof.

(App. 71). Accord CACC, Part II, § 101 (App. 71). Section 203 of Part II of the CACC, moreover, specifically provides that the PHA "shall not permit any family to occupy a dwelling in any project except pursuant to a written lease . . . which lease shall contain all relevant provisions necessary to meet the requirements of the Act and this Contract. . . . .." (App. 71). The federal government has, therefore, imposed on the PHA an affirmative duty to operate its housing projects in a safe manner to achieve the social and economic well-being of its tenants. *See, e.g.*, 42 U.S.C.A. § 1437w(h)(1)(B),(C) (West 1994); *Henry Horner Mothers Guild*, 780 F. Supp. at 512, 515-16 (housing authority must maintain project to keep it safe pursuant to CACC; here, part of tenants' complaints concerned vandals, trespassers, and drug dealers); *Concerned Tenants Assoc. of Father Panik Village v. Pierce*, 685 F. Supp. 316, 323-24. (D. Conn. 1988) (the CACC requires that the housing authority provide decent, safe and sanitary housing; the language of the Housing Act and its legislative history demonstrate that Congress intended that the regulatory contracts entered into pursuant to the Housing Act were designed to benefit the tenants as a mechanism for insuring that they receive decent and safe housing). As a matter of public policy, local housing agencies should be free from burdensome state laws which restrict the ability of the housing agency to meet their legal and contractual obligations under federal law.

B. The Housing Act expressly vests maximum authority in public housing agencies to respond to local conditions in implementing their management policies and lease provisions; the Maine Firearm Preemption Statute takes that authority away.

The Housing Act specifically gives "the maximum amount of responsibility to local public housing authorities in the administration of their housing programs." 42 U.S.C.A. § 1437 (West 1994). Lower courts have interpreted this phrase to grant broad discretion to public housing authorities to draft lease agreements with tenants and to respond to the particular security needs of their communities. *See Gholston v. Hous. Auth. of City of Montgomery*, 818 F.2d 776, 786 (11th Cir. 1987) (federal law grants housing authority discretion to manage the housing projects on a day-to-day basis); *Vandemark v. Hous. Auth. of City of New York*, 663 F.2d 436, 439 (3rd Cir. 1981) (HUD regulations vest in local housing authorities the right to make reasonable policy decisions); *Richmond Tenants Org.*, 751 F. Supp. at 1205 (district court uses deferential review when local housing board takes actions designed to address local concerns).

The PHA acted within its authority and discretion under federal regulations in adopting a ban on the possession and display of firearms in its leases. *See Richmond Tenants Org.*, 751 F. Supp. at 1206. The existence of an option to regulate in a way that would not conflict with state law is irrelevant. Rather, the issue is whether the agency is acting within the scope of its authority. *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 154, 102 S. Ct. 3014, 3023, 73 L. Ed. 2d 664 (1982); *cf. Spence v. Gormley*, 439

N.E.2d at 749 (housing authority is not obligated to choose the best or gentlest of methods to achieve the object of safe housing). Because Congress and the Secretary of HUD delegated discretionary power to local public housing agencies to draft and enforce leases with the goal of providing "decent, safe and sanitary" housing, the PHA acted within its power under federal law and was therefore free to use a method which might conflict with state law other than applicable state housing codes. *See*, 24 C.F.R. § 966.4(e)(2).

Express provision for managerial discretion under federal law has in the past preempted state laws which interfere with this discretion. In *Conille v. Secretary of Hous. and Urban Dev.*, 840 F.2d 105 (1st Cir. 1988), the First Circuit held that the Secretary of Housing had a duty to take reasonable steps to maintain housing owned or mortgaged by him in a decent and safe condition, including "at a minimum, the removal of hazards to life, health, and safety." *Conille*, 840 F.2d at 116. The Court held that any state law imposing maintenance duties more stringent than otherwise required under federal housing acts interfered with the discretion of the Secretary of Housing and was preempted. *Id.* at 116-117. A public housing authority bears the same obligation as the Secretary to maintain "decent, safe, and sanitary housing." *See id.* at 116. Although public housing authorities, as well as the Secretary of Housing, must maintain their premises according to state and local housing codes, the rules are specific that only "housing codes" dealing with the "physical condition" of housing apply. *See* 24 C.F.R. § 966.4(e)(2); 12 U.S.C.A. § 1701z-11(d)(2)(A) (West 1989 & Supp. 1995). Any other state law which attempts to limit the discretion of a housing authority is presumably preempted. Indeed, HUD considered and

subjected public housing agencies to all state and local laws. *See* 53 Fed. Reg. 33216, 33225 (1988) *withdrawn on other grounds*, 54 Fed. Reg. 6886 (1989). *Cf. Cuyahoga Met. Hous. Auth. v. City of Cleveland*, 342 F. Supp. 250 (N.D. Ohio 1972) (city ordinance violated national housing policy), *affirmed*, 474 F.2d 1102 (6th Cir. 1973); *Marino v. Town of Ramapo*, 68 Misc.2d 44, 326 N.Y.S.2d 162 (N.Y. Sup. Ct. 1971) (state statutes preempted to the extent they applied to federal housing project); *Virgin Islands Hous. Auth. v. Edwards*, 1994 V.I. LEXIS 10 at *8 (V.I. April 13, 1994) (Virgin Islands law regulating public housing authority lease provisions preempted by federal regulations); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 104 S. Ct. 2694, 81 L. Ed. 2d 580 (1984) (discretionary FCC regulation enacted to achieve statutory purpose, preempted state constitution).

This case presents a more compelling reason for federal preemption of a state law than the First Circuit faced in *Conille*. In *Conille*, application of a state law would have broadened the duty of public housing authorities beyond federal requirements. Here, the PHA is faced with a state law preventing it from complying with minimal federal standards. The federal regulations require the PHA both to maintain the premises in a "decent, safe, and sanitary condition" and to comply with state housing codes. 24 C.F.R. § 966.4(e)(1) & (2). The inclusion of both requirements is a recognition that the character of public housing may require more regulation than private landlord-tenant relationships and that the state or local statutory scheme may be inadequate to safeguard the interests of public housing tenants. *See*, 53 Fed. Reg. 33216, 33222-23 (1988), *withdrawn on other grounds*, 54 Fed. Reg. 6886 (1989). For instance, Congress has noted that public housing agencies have

attributes which make them especially susceptible to criminal activity. S. REP. NO. 103-174 103rd Cong., 2nd Sess. (1993), *reprinted in* 1994 U.S.C.C.A.N. 232, 269.

The record in this case establishes that the communities of the PHA experience a higher incidence of violence than surrounding Portland communities. In voiding the PHA lease provision banning the possession and display of firearms on the PHA premises, the Maine Supreme Judicial Court failed to recognize the unique characteristics of public housing projects. Application of Section 2011 to the PHA removes any discretion from the authority to handle its problems with crime and violence as it determines best meets the needs of its particular tenants. The Maine statute, as applied to the PHA, contradicts federal law, the policies behind that law, and the PHA's ability to comply with federal requirements to provide safe, decent and secure housing to its residents. Federal law, therefore, preempts the Maine Firearm Preemption Statute, as applied to the PHA.

CONCLUSION

For the above reasons this Court should grant this petition; issue a writ of certiorari to the Maine Supreme Judicial Court; and reverse the decision of the Maine Supreme Judicial Court.

Respectfully submitted this 30th day of June, 1995.

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APPENDIX

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MAINE SUPREME JUDICIAL COURT

REPORTER OF DECISIONS
DECISION No. 7191
Law Court Docket No.
Cum-94-188

JOHN DOE, et al.

v.

PORTLAND HOUSING AUTHORITY

Argued September 21, 1994
Decided April 4, 1995

Before WATHEN, C.J., and ROBERTS, GLASSMAN, CLIFFORD, and RUDMAN, JJ.

CLIFFORD, J.

John Doe and Jane Doe[1] appeal from the judgment entered in the Superior Court (Cumberland County, Wernick, A.R.J.) denying their request to have a provision in their lease with the Portland Housing Authority (PHA) that bans the possession of all firearms on the leased premises declared invalid and unenforceable. Because we conclude that the PHA is a political subdivision within the meaning of 25 M.R.S.A. § 2011 (Supp. 1994), the lease provision, which is based on a resolution enacted by the PHA in 1975, is preempted by section 2011. Accordingly, we vacate the

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1. The Superior Court allowed the plaintiffs to proceed anonymously.

judgment without reaching the constitutional issues advanced by the Does.

The PHA is a municipal housing authority created pursuant to 30-A M.R.S.A. § 4721 (Pamph. 1994). *See* 30-A M.R.S.A. §§ 4701-4993 (Pamph. 1994).[2] In 1975, the PHA Board of Commissioners passed a resolution prohibiting tenants from possessing firearms on PHA property. The firearms ban provision is a provision in the leases of all PHA tenants.[3] The Does are married and live in Sagamore Village, a PHA development. They have lived in PHA housing since 1981. John Doe is a veteran of the United States Marine Corps, a former federally licensed firearms dealer, and a licensed hunter in Maine. He works nights, and when he is away, Jane, who has used handguns for twenty-seven years and target

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2. 30-A M.R.S.A. § 4721(1) creates in each municipality a "public body corporate and politic to be known as the 'Housing Authority' of the municipality." The authority is activated if the municipality declares a need for it to carry out "public and essential governmental functions." *Id.* § 4741. The authority is run by its commissioners, *id.* § 4723(1), and the commissioners are appointed by the selectmen or the mayor. *Id.* § 4721(4). The authority has all the powers necessary to carry out its functions, including the power to sue and be sued. *Id.* § 4741. It has the authority to acquire and own property, including the power of eminent domain. *Id.* § 4741(5). Its property is declared to be public property used for essential public and governmental purposes and is exempt from all taxes. *Id.* § 4742(5). A housing authority may be sued pursuant to the Maine Tort Claims Act. *Id.* § 4741(1).

3. The Does's lease agreement with PHA provides, "The Tenant's possession of or display of a firearm upon the premises is prohibited. A violation of this Section is grounds for automatic termination of this Lease."

shoots at a gun club, is fearful for her safety. In violation of the lease agreement, they own and possess hunting rifles and handguns. To remain in their home without the threat of having their lease terminated, the Does brought a declaratory judgment action seeking, *inter alia*, a declaration that the firearms ban in their lease is contrary to the Maine Constitution and therefore is void and unenforceable, and that the lease is preempted by state law regulating firearms.

The trial court found that the lease provision does not violate the sections of the Maine Constitution relied on the by Does: the right to keep and bear arms,[4] the right to defend life and liberty,[5] or the right to equal protection of the laws.[6] The court also concluded that the ban on the possession of firearms is not preempted by state law and, therefore, upheld the lease provision and denied the Does any relief. This appeal by the Does followed.

If the Legislature's preemption of the regulation of firearms includes resolutions enacted by the PHA, then the resolution, and thus the lease provision that flows from it, are void and we need not reach the constitutional issues advanced by the Does. Accordingly, we first address the issue of preemption. Whether the resolution is void depends on whether the PHA is a political subdivision within the meaning of 25 M.R.S.A. § 2011

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4. Me. Const. art. I, § 16.

5. Me. Const. art. I, § 1.

6. Me. Const. art. I, § 6-A.

(Supp. 1994). That question is one of law that we review *de novo*. *See Maine Beer & Wine Wholesalers Ass'n v. State*, 619 A.2d 94, 97 (Me. 1993) (statutory interpretation is matter for this Court).

In defending its lease provision and the decision of the Superior Court, the PHA contends, *inter alia*, that its lease provision is not preempted because only orders, ordinances, rules, and regulations of "political subdivisions" are preempted, and the PHA is not an enumerated political subdivision. In addition, it argues that the only purpose of the preemption statute is to make firearms regulation uniform so that hunters traveling through the state will not be subject to different regulations when they cross town lines, and thus, the Legislature did not intend to preempt PHA's lease provision. We disagree.

A federal statute preempts a state law when Congress has explicitly stated its intention to preempt state regulation of a certain field. *Rozanski v. A-P-A Transp., Inc.*, 512 A.2d 335, 339 (Me. 1986) (quoting *Michigan Canners & Freezers Ass'n, Inc. v. Agricultural Mktg. & Bargaining Bd.*, 467 U.S. 461, 468 (1984)). Likewise, a state law preempts the regulations or ordinances of constituent political units if the Legislature expresses an intent to preempt regulations in that field. In the present case, the Legislature passed a statute in 1989 that provides, in pertinent part:

> **1. Preemption.** The State intends to occupy and preempt the *entire* field of legislation concerning the regulation of firearms, components, ammunition and

> supplies.... [A]ny existing or future order, ordinance, rule or regulation in this field of any political subdivision of the State is void.
>
> **2. Regulation restricted.** ... [N]o political subdivision of the State, including, *but not limited to*, municipalities, counties, townships and village corporations, may adopt any order, ordinance, rule or regulation concerning the sale, purchase, purchase delay, transfer, ownership, use, possession, bearing, transportation, licensing, permitting, registration, taxation or any other matter pertaining to firearms, components, ammunition or supplies.

25 M.R.S.A. § 2011 (Supp. 1994) (emphasis added).

The preemption statute is not clear on its face as to whether the PHA is a political subdivision. The term "political subdivision" is not defined within the statute, and authorities are not named specifically as one of the enumerated examples of a political subdivision in the statute. *See id.* § 2011(2). It is significant that the statute makes it clear that the recited examples of political subdivisions are nonexclusive. Although the term political subdivision is defined in five other chapters,[7] the different definitions do not lead to a

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7. Within the Maine Tort Claims Act, "political subdivision" is defined as:

> any city, town, plantation, county, administrative entity or instrumentality created pursuant to Title 30-A, chapters 115 and 119, quasi-municipal corporation and special purpose district, including, but not limited to, any water district, sanitary district, hospital district, school district of any type, any volunteer fire association as defined in Title 30-A section 3151, and any emergency medical service.

14 M.R.S.A. § 8102(3) (Supp. 1994) (footnotes omitted). Although a housing authority is not listed separately as one of the enumerated nonexclusive examples of a political subdivision, because it has broad powers and many of the indicia of a governmental entity, it would appear to be a political subdivision within the meaning of section 8102(3). *See Young v. Greater Portland Transit Dist.*, 535 A.2d 417, 418 (Me. 1987) (transit district is quasi municipal corporation as well as special purpose district and thus political subdivision within meaning of section 8102(3)). Perhaps because of this, 30-A M.R.S.A. § 4741(1) provides specifically that a housing authority may be used pursuant to the Maine Tort Claims Act. Other definitions of political subdivision include "any municipality, district or any portion or combinations of 2 or more thereof," 22 M.R.S.A. § 2601(7) (1992) (statutory chapter dealing with water for human consumption); "any municipality, plantation, county, quasi-municipal corporation and special purpose district, including but not limited to, any water district, sanitary district, hospital district, municipal electric utility and school administrative un[illegible]" 30-A M.R.S.A. § 2252 (Pamph. 1994) (law concerning public self-funded pools); *see also* 38 M.R.S.A. § 1651(3) (1989) (statute prohibiting use of polystyrene foam plastic containers and plastic beverage stirrers gives political subdivision "the same meaning set forth in Title 14, section 8102, subsection 3.").

Only in the Maine Civil Emergency Preparedness Act does the definition explicitly refer to authorities. The Act defines political subdivision as "counties, cities, towns, villages, townships, districts, *authorities*, and other public corporations and entities organized and

consistent conclusion as to whether a municipal housing authority is a political subdivision. *Compare* 22 M.R.S.A. § 2601(7) (1992) (political subdivision defined as municipality, county, district, or any portion or combination thereof) *with* 37-B M.R.S.A. § 703(4) (1989) (authorities are explicitly enumerated as political subdivisions).

Because section 2011 is not clear on its face as to whether an Authority is a political subdivision, we look to the legislative history of section 2011 to determine the legislative intent. *See Jordan v. Sears, Roebuck & Co.*, 651 A.2d 358, 360 (Me.1 994) (when plain meaning of statutory language is ambiguous, we examine other evidence of legislative intent, including legislative history). The legislative history of section 2011 supports the conclusion that the Legislature intended to preempt the regulation of firearms by the PHA. *Lewiston Daily Sun, Inc. v. City of Auburn*, 544 A.2d 335, 337 (Me. 1988) (courts look to legislative history to resolve ambiguity as to what public entities fall within purview of statute). Although the PHA correctly points out that one purpose of the legislation is to make firearms regulation uniform so that hunters traveling through the state will not be subject to different regulations in different municipalities, the legislative record reveals that this was not by any means the sole reason for passing that law. In fact, the statement of fact accompanying the statute makes no mention of an intent to protect those who travel from town to town with firearms.

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existing under charter or general law." 37-B M.R.S.A. § 703(4) (1989) (emphasis added).

The principal thrust of the preemption statute voiced in the legislative record was to make the regulation of firearms uniform for all residents of Maine. Concern was expressed for laws in different communities imposing waiting periods on the purchase of firearms, different procedures for purchasing ammunition, and the resurrection of an old ordinance in Portland restricting the ability to carry a loaded firearm. Passed on the heels of a constitutional amendment changing Maine's constitutional right to bear arms from a collective to an individual right,[8] section 2011 was enacted to reinforce the amendment and to ensure uniformity in the regulation of guns for all Maine citizens.[9] The legislative history

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8. Me. Const. art. I, §16, amended in 1987, provides that "[e]very citizen has a right to keep and bear arms and this right shall never be questioned."

9. Some of the comments by legislators included:

> I am very proud to be a cosponsor of L.D. 994 because I believe that it is time that we guarantee to Maine citizens that all would share equally in the Maine Constitutional protection of the right to keep and bear arms. As we all know, inequality in the application of laws leads to discrimination and disenfranchisement.

Legis. Rec. H-784 (1989) (statement of Rep. Rotondi).

> With the acceptance of this report, we would put a law in place that would clearly guarantee all citizens of the State of Maine equal protection.... [L]imiting the rights of Maine's citizens clearly violates the spirit of the referendum Constitutional Amendment that was passed in 1987 that upheld our long traditional belief of the right of gun

is consistent with the statute's expressed intent to "occupy and preempt the *entire* field of legislation concerning the regulation of firearms," and to void any "order, ordinance, rule or regulation in this field." 25 M.R.S.A. § 2011 (emphasis added).

Only two exceptions were made to the Legislature's preemption of firearms regulation, and the PHA's lease provision does not fall within either of them. *See* 25 M.R.S.A. § 2011(3) & (4). Section 2011(3) allows ordinances, orders, rules, or regulations that conform exactly with state law, or that regulate the discharge of firearms. 25 M.R.S.A. § 2011(4) allows a law enforcement agency to regulate the type and use of firearms issued or authorized for use by its employees. There is no mention in the legislative record that firearms regulations like that promulgated by PHA would escape preemption. Instead, the record is replete with statements that the preemption is sweeping and will make

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ownership.

Legis. Rec. H-780 (1989) (statement of Rep. Kilkelly).

> We had a Constitutional Amendment not too long ago which was reaffirmed by the vast majority of the citizens of this state. This Bill just establishes that state firearms prevention and policy .... I believe [this Bill] is very important and it just reaffirms our Constitutional right to bear arms and establishes a state uniform policy throughout the state.

Legis. Rec. S-893 (1989) (statement of Sen. Matthews).

uniform for all Maine citizens.[10] In fact, the Legislature

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10. Some of the statements by legislators included:

> I think if we are going to have laws in this state, they ought to be uniform throughout the state, they shouldn't have separate laws in each community and each town.... [L]et the people bring the request to the Legislature and let us set the laws.

Legis. Rec. S-899 (1989) (statement of Sen. Dillenback).

> It is obvious that Maine and Maine's citizens need a uniform firearms law, laws which they can know and upon which they can rely. If towns feel that they need special types of firearms ordinances, firearms powers or if they think that Maine's law needs amending, then they have a simple solution. They are well represented, they can have their legislators come up to us, present a bill, and we will consider it.

Legis. Rec. H-779 (1989) (statement of Rep. Priest). In fact, Rep. Priest went on to express a goal of avoiding lawsuits such as this one when he stated, "I will submit to you that enactment of this bill will prevent a series of costly lawsuits from taking place to determine whether or not ordinances violate state firearms policy or not." *Id.*

In opposition to the bill, one representative stated:

> The purpose of the bill before us today is to strip away community control over the one field surest to strike sparks in a legislative body and that is (a) local control over local laws and (b) those local laws for the purpose of addressing unspecified grievances on the part of a few. This sweeping preemption law would apply equally as you have already heard to all persons whether you live in Berwick, Brunswick, Portland or Stoneham.

Legislature addressed whether municipalities with over 15,000 citizens should be exempted from the preemption, and such an exemption was rejected. A cosponsor of the bill stated that a purpose of the preemption statute was to protect the citizens of large communities from discriminatory firearms regulations, because there are "law-abiding gun owners in large communities who are often innocent victims of restrictive gun control measures." Legis. Rec. H-784 (1989) (statement of Rep. Rotondi). PHA's lease provision is contrary to the Legislature's intent to ensure that all Maine citizens are treated equally with regard to firearms regulation. Moreover, the governmental entities listed in the stature as political subdivision are examples only, and nonexclusive. The PHA possesses broad powers consistent with its mission of carrying out "public and essential functions," and has many of the indicia of a governmental entity. *See supra* note 2. All of the foregoing leads to the conclusion that the PHA, a "public body corporate and politic," is a political subdivision within the meaning of section 2011. *See Young v. Greater Portland Transit Dist.*, 535 A.2d 417, 417 (Me. 1987) (District, a "body politic and corporate," is governmental entity and political subdivision pursuant to Maine Tort Claims Act).

The PHA also contents that the United States Housing Act, 42 U.S.C.A. §§ 1404a-1440 (1994), preempts any preemption under state law. It argues that federal law giving municipal housing authorities management responsibilities over their programs, 42 U.S.C.A. § 1437

Legis. Rec. H-784 (1989) (statement of Rep. Adams).

(1994), indicates an intent on the part of Congress to preempt state law. Section 2011, however, does not conflict with federal law. There are three ways in which a federal law may preempt a state law:

> First, in enacting the federal law, Congress may explicitly define the extent to which it intends to preempt state law. Second, even in the absence of express preemptive language, Congress may indicate an intent to occupy an entire field of regulation, in which case the States must leave all regulatory activity in that area to the Federal Government. Finally, if Congress has not displaced state regulation entirely, it may nonetheless preempt state law to the extent that the state law actually conflicts with federal law. Such a conflict arises when compliance with both state and local law is impossible, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Rozanski, 512 A.2d at 339 (quoting *Michigan Canners & Freezers Ass'n*, 467 U.S. at 468). Until now, Congress has neither expressly nor impliedly preempted the regulation of firearms by states. In addition, the preemption of firearms regulation by the state expressed in section 2011 does not conflict with the Housing Act to the extent that the "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* We are unpersuaded that

Congress intended to preempt the state's right to provide for the uniform regulation of firearms.

The entry is:

> Judgment vacated. Remanded to the Superior Court to enter a judgment declaring that the provision in the Plaintiffs' lease banning the possession of firearms on the leased premises is invalid.

April 4, 1995 Mandate

STATE OF MAINE

SUPREME JUDICIAL COURT
Sitting as the Law
Court

Docket No. CUM-94-188

JOHN DOE, et al.,	)	
	)	
v.	)	
	)	MANDATE
	)	
PORTLAND HOUSING AUTHORITY	)	
	)	

The above-captioned cause having been brought before this Court, sitting as the Law Court, from the Superior Court in the County of Cumberland; and it having been heard and maturely considered;

IT IS ORDERED that the Clerk of the Law Court enter upon the Law Court docket and certify to the Clerk of the Superior Court in the County of Cumberland the following mandate therein:

> Judgment vacated. Remanded to the Superior Court to enter a judgment declaring that the provision in the Plaintiffs' lease banning the possession of firearms on the leased premises is invalid.

Dated: April 4, 1995

April 4, 1995 Mandate

For the court,

/s/ Robert W. Clifford

Associate Justice

A true copy attached and certified.

/s/ James Chute

June 1, 1995 Order, Superior Court

STATE OF MAINE
CUMBERLAND, ss

SUPERIOR COURT
Civil Action
Docket No. CV-92-1408

JOHN and JANE DOE, et al.,

Plaintiffs

v.

PORTLAND HOUSING AUTHORITY,

Defendant

ORDER

By Mandate of the Supreme Judicial Court, Sitting as the Law Court, it is hereby ordered that the judgment of this Court dated December 29, 1993 is hereby vacated. The Court hereby declares that any resolution or lease provision of the defendant that bans the possession of or display of a firearm upon the leased premises is invalid.

DATED: [June 1, 1995]

/s/ Sidney W. Wernick
Sidney W. Wernick
Justice, Supreme Judicial Court, Active Retired, Sitting in the Superior Court

December 29, 1993 Opinion and Order of Superior Court

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-92-1408

JOHN and JANE DOE,

Plaintiffs

v.

PORTLAND HOUSING AUTHORITY,

Defendant

OPINION AND ORDER

This lawsuit was instituted to attack, as violative of the Maine Constitution, a provision that the defendant Portland Housing Authority (PHA) requires in all its leases. The provision prohibits a tenant from possessing or displaying any firearm on PHA premises, upon penalty of termination of the lease. Because of the potential of recriminations against the persons bringing this suit, the court allowed them to proceed as anonymous plaintiffs, under the names John Doe and Jane Doe.

By their complaint the plaintiffs ask for a declaratory judgment that the firearms ban provision in their lease is void and unenforceable against them because it contravenes rights said to be guaranteed to the plaintiffs by the Constitution of Maine: (1) to keep and bear arms,

(2) to defend life and liberty, and (3) to enjoy the equal protection of the laws. The plaintiffs have abandoned the claim made in their complaint seeking an award of damages.

After having denied a motion by the plaintiffs for summary judgment in their favor, the court (without a jury) held an evidentiary hearing at which the parties made various stipulations and presented testimonial and documentary evidence.

I. "Suitability" of the PHA and Declaratory Judgment

In their complaint the plaintiffs aver that they are keeping firearms in the PHA premises they occupy. They are thus in violation of their lease and subject at any moment to termination of their tenancy. For this reason, the plaintiffs are asking the court to adjudge the lease provision prohibiting their possession of firearms on the premises they occupy unenforceable against them because it is unconstitutional and, therefore, void.

As one of various alternatives, 30-A M.R.S.A. § 4741(1) provides for the PHA "to be sued on its written contracts." The gravamen of the present action concerns the enforceability of a provision in a written lease executed by the PHA and the plaintiffs. Since a lease is a contract, a written lease is a written contract within the

within the scope of the "written contract" authorization for a suit against the PHA.[1]

In these circumstances involving, as they do, a real, live and justiciable controversy, declaratory judgment is available as a statutorily authorized procedural alternative. 14 M.R.S.A. §§ 5951-5963 (1980); *Hodgdon v. Campbell*, 411 A.2d 667 (Me. 1980). The court holds valid and appropriate the plaintiffs' resort to declaratory judgment as the mechanism for adjudication of the present controversy.

II. The Issue of the State Legislature's Preemption of Regulation of Firearms

After the evidentiary hearing, in a memorandum of argument submitted to the court the plaintiffs asserted, for the first time, the claim that the PHA's lease provision as to firearms is a nullity because in 25

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1. This conclusion avoids the need for the court to utilize a most recently filed stipulation of the parties purporting to overcome substantive (perhaps even "jurisdictional") deficiencies that would arise were another basis for suit against the PHA specified in 30-A M.R.S.A. § 4741(1)--namely, M.R. Civ. P. 8OB--to be made the ground to support resort to declaratory judgment as an alternative procedure.

The court therefore denies the stipulation's request for amendments to the complaint and the addition of another party defendant. The court believes that these changes are unnecessary for adequate decision of the issues raised and would inject undesirable complexities into the case.

M.R.S.A. § 2011 (Supp. 1993) the Maine legislature preempted the regulation of firearms.

The PHA has objected to consideration of the issue on the ground of the untimely raising of it. The court, nevertheless, will consider the issue in the interest of judicial economy. Decision of it in at least one alternative (1) could provide a definitive answer, once and for all, as to the extent of the PHA's power to regulate the possession of firearms on its premises, and (2) could avoid need to address the constitutional questions the plaintiffs have raised (an alternative traditionally deemed of primary importance in judicial proceedings). Moreover, there has been no disadvantage to the defendant PHA that would constitute prejudice since defendant's counsel have had sufficient time for research and have submitted to the court an extensive written argument on the issue.

In 1989, the Maine legislature enacted 25 M.R.S.A. § 2011. Stating its intent to preempt the field of "legislation" that regulates firearms, the legislature made void any such action by a "political subdivision" of the State.[2] Section 2011 provides no definition of "political

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2. 25 M.R.S.A. § 2011 provides:

> **1. Preemption.** The State intends to occupy and preempt the entire field of legislation concerning the regulation of firearms, components, ammunition and supplies. Except as provided in subsection 3, any existing or future order, ordinance, rule or regulation in this field of any political subdivision of the State is void.

subdivision", and any illustrations it uses do not include "authorities".

Elsewhere in the Revised Statutes there are definitions of "political subdivision" for various particular purposes. In five other chapters[3] definitions appear that vary to serve the purposes of the chapter providing the definition. For example, ch. 601 of Title 22 states: "'Political subdivisions' means any municipality, county, district or any portion or combination of 2 or more thereof." 22

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2. Regulation restricted. Except as provided in subsection 3, no political subdivision of the State, including, but not limited to, municipalities, counties, townships and village corporations, may adopt any order, ordinance, rule or regulation concerning the sale, purchase, purchase delay, transfer, ownership, use, possession, bearing, transportation, licensing, permitting, registration, taxation or any other matter pertaining to firearms, components, ammunition or supplies.

3. Exception. This section does not prohibit an order, ordinance, rule or regulation of any political subdivision which, with the exception of appropriate civil penalty provisions, conforms exactly with any applicable provision of state law or which regulates the discharge of firearms within a jurisdiction.

4. Law enforcement agency. Nothing in this section limits the power of any law enforcement agency to regulate the type and use of firearms issued or authorized by that agency for use by its employees. For the purposes of this section "law enforcement agency" has the same meaning as set forth in section 3701.

3. 14 M.R.S.A. § 8102(3) (1980); 22 M.R.S.A. § 2601(7) (1992); 30-A M.R.S.A. § 2252 (Pamph. 1993); 37-B M.R.S.A. § 703(4) (1989); 38 M.R.S.A. § 1651(3) (1989).

M.R.S.A. § 2601(7). In title 30-A, ch. 17 is the provision: "'Political subdivision' means any municipality, plantation, county, quasi-municipal corporation and special purpose district . . . ." 30-A M.R.S.A. § 2252. Given the lack of uniformity, such definitions yield little guidance to the correct meaning of "political subdivision" as a foundational concept delineating the scope of section 2011. To ascertain that correct meaning, the court must concentrate on all the relevant language of section 2011 itself and seek to resolve ambiguity by resort to the legislative history.

Section 2011 states that, for its purposes, political subdivisions of the State include, but are not limited to, "municipalities, counties, townships and village corporations." 25 M.R.S.A. § 2011(2), "By the familiar *'ejusdem generis'* rule, a general term followed by a list of illustrations is ordinarily assumed to embrace only concepts similar to those illustrations." *Penobscot Nation v. Stilphen*, 461 A.2d 478, 489 (Me. 1983). As an "authority", the PHA is fundamentally different in nature from the entities specifically listed in section 2011(2).

The tenants of the PHA developments do not elect the governing body of the PHA; its commissioners are appointed by the city. Residents have no direct power to affect the management of the PHA. The PHA does not have political or governmental powers other than those necessary to carry out the specific purposes for which it was created. The PHA has no taxing authority. The PHA does not enact legislation to regulate residents' behavior. It enters contracts with its residents, the terms of which affect only the contracting parties.

December 29, 1993 Opinion and Order of Superior Court

> [A] housing authority is one of a large class of corporations created by the government to undertake public enterprises in which the public interests are involved to such an extent as to justify conferring upon such corporations important governmental privileges and powers . . . , but which are not created for political purposes and which are not instruments of the government created for its own uses or its direct control.

Hous. Auth. of Woonsocket v. Fetzik, 289 A.2d 658, 662 (R.I. 1972). Thus, the basic difference between "municipalities, counties, townships . . . village corporations and the PHA is that the former are created primarily for the political purposes of locally governing all those residing within their geographical boundaries by actions having the effect of law, whereas the PHA exercises control over its residents through the contractual mechanism of lease management. The local control by law over the PHA residents is achieved through the City of Portland, the municipality within which PHA premises are located.

Express language in section 2011 confirms this basic difference. The legislature's preemption is "of the entire field of legislation concerning the regulation of firearms" 25 M.R.S.A. § 2011(1) (emphasis added). Plainly, contractual provisions are not "legislation". Similarly, orders, rules or regulations as to its tenants that the PHA has the power to make are not enforceable in the manner of the enforceability of legislation, since the only sanction for violations is through provisions in the tenants' leases authorizing termination of the tenancy and eviction from

the premises. Thus, the "order[s], . . . rule[s] or regulation[s] that 25 M.R.S.A § 2011(l) makes "void" do not extend to those the PHA may establish, since those of the PHA are not in the nature of "legislation"; they lack the essential quality of being "law".

Often in ch. 201 itself the term "political subdivision" is used in a manner distinguishing it from housing authorities. In defining a "State public body" the statute refers to "any city, town, district or other political subdivision of the State." 30-A M.R.S.A. § 4702(16) (Pamph. 1993). An authority is not included, and, by the canon of statutory interpretation *noscitur a sociis* (it is known from its associates), "other political subdivision" becomes identified by its associates "city, town, district" to make the same differentiation already fully analyzed above. Next, bonds and obligations of a housing authority "shall not be a debt of the municipality, the State or any political subdivision of the State". 30-A M.R.S.A. § 4871(6) (Pamph. 1993). Thus, again, we have the same distinction as previously analyzed. Lastly, 30-A M.R.S.A. § 4747 grants power to "[a]ny state body", which by definition includes "political subdivision", § 4701(16), to cooperate with a housing authority--thereby differentiating a political subdivision from a housing authority.

Turning to the legislative history of section 2011, the court concludes that it strongly confirms the special meaning of political subdivision that the differentiations of language usage, already discussed, tend to convey. Proponents of the proposed measure that became section 2011 were aiming to ensure that hunters and gun

aficionados would be able to travel through various jurisdictions without the risk of unwittingly violating a jurisdiction's firearms law and being subject to arrest for the violation. *See*, Legis. Rec. S-899 (statement of Sen. Dillenback), H-779 (statement of Rep. Priest), H-780 (statement of Rep. Kilkelly), H-781 (statement of Rep. Jacques), H-782 (statement of Rep. Paul), H-784 (statement of Rep. Stevens), comments of Sportsman's Alliance of Maine submitted on the Joint Standing Committee on Legal Affairs on May 2, 1989; comments of Susan Baldyga Misiora, Maine State Liaison, National Rifle Association of America submitted to the Joint Standing Committee on Legal Affairs on May 2, 1989. The powers statutorily conferred on municipal housing authorities, including the PHA, are without rational relationship to this objective. Whatever action the PHA may take in the exercise of its leasing or project-management powers, hunters and gun aficionados will still be able to travel freely without danger of violating any law subjecting them to arrest or penalty for violation of law. Only PHA tenants are bound by the lease provisions. Even if tenants are responsible for their guests, no one will be trapped unwittingly into transgression; a tenant, by signing the lease knows of the firearms provision in it, and the PHA lacks power to impose sanctions on guests.

In sum, the language of section 2011, the distinction between housing authorities and "political subdivisions" made by Title 30-A, ch. 201, and the legislative history of section 2011 demonstrate that the PHA is not a "political subdivision" within the meaning of section

2011.[4] The preemption statute has no applicability to the PHA activity of inserting a firearms ban provision into leases. Such lease provisions are valid notwithstanding 25 M.R.S.A. § 2011.[5]

---

4. Other jurisdictions have similarly held that housing authorities are not political subdivisions. *E.gs., Hous. Auth. of Woonsocket v. Fetzik*, 289 A.2d 658, 662 (R.I. 1972); *Adler v. Lincoln Hous. Auth.*, 623 A.2d 20, 23 (R.I. 1993); *Lloyd v. Twin Falls Hous. Auth.*, 113 P.2d 1102 (Idaho 1941). Still others have relied upon this distinction in support of a determination that another type of body is, or is not, a political subdivision. *E.gs., Maryland-Nat'l Capital Park and Planning Comm'n v. Montgomery County*, 296 A.2d 697 (Md. 1972); *Bolen v. Bd. of Firemen, Policemen and Fire Alarm Trustees*, 308 S.W.2d 904, 906 (Tx. Ct. App. 1957). *But see Richmond Tenants v. Richmond Redev. and Hous. Auth.*, 751 F. Supp. 1204, 1207 (E.D. Va. 1990) (stating, in passing and without need to differentiate, that the housing authority is a political subdivision).

5. It does not weaken this conclusion that in subsection 4 of section 2011 reference is made to an "agency" acting for "law enforcement". Subsection 4 was a later addition to this statute, provided for in an "errors and omissions" amendment. Its purpose was to give clarification, not to create an exception to a coverage thought to exist. It seems apparent that the clarification was in abundance of caution to avoid any misapprehension that the police departments of "municipalities . . . townships or village corporations" or the sheriffs' departments of counties--all assuredly "political subdivisions"--would be unable to regulate the "type and use of firearms issued or authorized for use by . . . their employees."

III. The Issues Under the Constitution of Maine

A. The PHA's Powers; Their Character as a Public Function

A question arises preliminary to the discussion of the particular constitutional issues the plaintiffs have raised. The question, also constitutional in nature, is whether the powers the State of Maine has delegated to the PHA are validly delegated, as serving public rather than private purposes.

The State has given to the PHA, statutorily characterized as a "public body corporate and politic", such powers as will be adequate to enable the PHA to provide to persons of low income decent, safe and affordable housing accommodations.

The contemplated "safety" of the "housing" is not confined simply to the physical condition or structural soundness of the dwellings. It encompasses the control, through leasing and managing, of tenant activity or behavior that might endanger the safety and security of a development's environment. Federal regulations, which are promulgated by reason of the federal government's control over the subsidies it affords to municipal housing projects, make this point abundantly clear. Federal regulations provide, for example:

(1) "each PHA shall adopt and implement policies and procedures embodying standards and criteria for tenant selection which take into consideration . . . the statutory purpose

> in developing and operating . . . public housing projects which provide . . . a suitable living environment", and the policies and procedures "must be designed to . . . [p]reclude admission of applicants whose habits and practices reasonably may be expected to have a detrimental effect on . . . the project environment", 24 C.F.R. § 960.24 (sic);
>
> (2) "the lease shall provide that the tenant shall be obligated . . . [t]o abide by necessary and reasonable regulations promulgated by the PHA for the benefit and well-being of the housing project and the tenants. . . .", and also "[t]o act, and cause household members of guests to act, in a manner which will not disturb other residents' peaceful enjoyment of their accommodations and will be conducive to maintaining the project in a safe and sanitary condition. . ." 24 C.F.R. § 966.4(f)(4) and (1).

On this point, *See also, Richmond Tenant Org., Inc. v. Richmond Redev. and Hous. Auth.*, 751 F.Supp. at 1214.

In a closely related context the Maine Law Court has held that the providing of such decent, safe and sanitary housing to persons of low income serves a public not merely a private, purpose because it involves essentially the "police power" activity of "having a clear relationship to the health, safety, morals and welfare of the people as a whole . . ." See *Maine State Hous. Auth. v. Depositors*

Trust Co., 278 A.2d 699, 705 (Me. 1971). This relationship is made even more explicit by the avowal in the Municipal Housing Authority Act itself that the exercise of a municipal housing authority's powers is a means of ameliorating the poor health, the spread of crime and the many dangers to safety and welfare arising from a shortage of decent, safe and affordable housing for persons of low income. 30-A M.R.S.A. § 4703(l)(D) and (E) (Pamph. 1993).

This court concludes, therefore, that the State has validly delegated to the PHA, a public body corporate, particular leasing, managing and operating powers as to housing projects for low income persons that serve a public purpose, and are police powers in nature, insofar as they function to promote the health, safety, morals and welfare of the people as a whole by providing persons of low income with decent, safe and affordable housing.

As a public body corporate so acting, the PHA is controlled by the "Declaration of Rights" in the Maine Constitution. We proceed, then, to evaluate whether any of the constitutionally protected rights asserted by the plaintiffs in this case nullify the PHA's lease requirement prohibiting the possession or display of any firearms on PHA premises.

B. The Right "To Keep and Bear Arms"

Article 1, Sec. 16 of the Maine Constitution provides: "Every citizen has a right to keep and bear arms and this right shall never be questioned." To begin the analysis of the application of this constitutional provision to the

instant case the court makes findings of the facts that are relevant.

There is little, if any, dispute as to the following facts the court finds.

The defendant PHA is a "public body corporate and politic" created by Resolution of the City of Portland's Council pursuant to statutory authorization conferred by P.L. 1943, ch. 260, now revised and codified as 30-A M.R.S.A. §§ 4721, 4702(2) (Pamph. 1993). The PHA receives subsidies from the federal government pursuant to, and as regulated by, the Housing Act of 1937, 42 U.S.C.A. 1437, *et seq.* (West 1978 & Supp. 1993).

Charged with the responsibility of providing decent, safe, sanitary and affordable housing for persons of low income, the PHA manages, operates and supervises developments in the City of Portland. About 2,700 persons live in the 1,024 dwelling accommodations. The developments are of two basic types. One type offers apartment-style housing accommodations for the elderly and the physically and mentally disabled, including persons with substance abuse problems. The other type provides housing for families and persons living individually.

The plaintiffs John and Jane Doe have been residents of public housing since 1981. When they entered into their lease with the PHA, the plaintiffs were made specifically aware that the lease contained a provision prohibiting "possession of or display of a firearm upon the premises" and making a "violation . . . grounds for automatic termination of this Lease." The plaintiffs have

automatic termination of this Lease." The plaintiffs have knowingly been violating the firearms ban set out in their current lease by possessing in the premises they occupy rifles and handguns, which they use for hunting, target shooting and collecting. Neither plaintiff is a felon or mental patient. John is a veteran of the United States Marine Corps, a former federally licensed firearms dealer, a licensed hunter, a NRA member and a co-manager of a fast food restaurant. Jane has used handguns for 27 years and target shoots at a gun club. John and Jane Doe are the parents of a thirteen year old child who attends a local high school. They lack means to store their firearms elsewhere than on PHA premises.

The court finds additional facts as follows.

In the early 1970's gangs of youths had perpetrated vandalism, assault and arson and engaged in other acts of intimidation at the various developments in which families and individuals reside. The problems were so severe that persons rendering essential services (e.g., fire department personnel) refused to enter the premises without a police escort. As a partial response to these problems, the PHA Board of Commissioners, on April 17, 1975, passed a "Resolution" forbidding any tenant to "own, harbor, conceal, keep or allow any gun, shotgun, pistol, rifle or firearm of any type in or around his/her premises or the property of the Portland Housing Authority at any time." The following month the Commissioners deleted the word "own" from the Resolution. In implementation of the Resolution, the firearms ban provision was made a requirement in the leases of all the PHA tenants.

December 29, 1993 Opinion and Order of Superior Court

Turning to the applicable law, the court begins with the foundational point that even though the 1987 amendment to Article 1, Sec. 16 of the Maine Constitution transformed it from a collective to an individual right, the right to keep and bear arms is not absolute. It is subject to reasonable police power regulation. *State v. Brown*, 571 A.2d 816 (Me. 1990). Quoting from *National Hearing Aid Centers, Inc. v. Smith*, 376 A.2d 456, 460 (Me. 1977), Brown further explains: "Reasonableness in the exercise of the police power requires that the purpose . . . be in the interest of the public welfare and that the methods utilized bear a rational relationship to the intended goals." *Brown*, 571 A.2d at 820.

On all the evidence presented the court finds that the purposes for which the PHA required the firearms ban provision in its leases were:

A. to prevent on PHA premises

(1) escalation of crime and violence
(2) accidental shootings, especially by, and of, children
(3) enhanced seriousness of injury occurring in domestic violence; and

B. to promote an atmosphere and feeling of safety and security amongst the PHA tenants.

Plainly, these are purposes that are legitimate objectives of the exercise of police power; they are directly in the interest of the public health, safety and welfare.

The reasonableness of the firearms ban provision in the leases as the means to achieve the foregoing legitimate objectives is to be assessed by the standard set out in *Brown*, *id*. Again quoting from *National Hearing Aid Centers, Inc.*, 376 A.2d at 461:

> . . . to withstand the test of reasonableness the regulatory means must bear a rational relationship to the evil sought to be corrected. . . . It is not necessary that the methods adopted . . . be the best or the wisest choice. No matter how much the court might have preferred some other procedure, if the measure is reasonably appropriate to accomplish the intended purpose we must give it effect.

Brown, 571 A.2d at 820.

Brown, moreover, clarifies what reasonableness requires in regard to the directness or closeness of the relational "fit" between a measure and the evils to be avoided. In *Brown* denying possession of a firearm to a person convicted of a non-violent felony was held constitutional. The rationale was that there is manifested in a person convicted of a felony, even if it involves no violence, a "degree of lawlessness" sufficient to pose a "very real threat to public safety created by his continued misconduct, a threat that might well be aggravated by the availability of a firearm." *Id*. at 821.

The lesson of *Brown* is thus that reasonableness in the regulation of the possession of firearms does not demand that public safety be actually harmed, or be in an

immediate danger of harm, or that the fit between means and ends be of direct closeness or of exact contour. Reasonableness requires only that there be conditions generating a "threat" of harm to safety that is "real" and that the threat is likely "to be aggravated by the availability of a firearm."

With the guidance provided by *Brown* in mind, we proceed to consideration of the present context, one that involves circumstances of first impression in Maine as well as, it appears, across the nation. *See*, Robert Dowlut, *Bearing Arms in State Bill of Rights, Judicial Interpretation and Public Housing*, 5 St. Thomas L. Rev. 203, 214 (1992).

On all the evidence, the court makes the following additional, particularly relevant, findings of fact.

The PHA developments in which families and individuals reside continue, presently, to have unique tendencies for violence and even criminal behavior that specially threaten the health, safety and welfare of the residents. A primary reason is that the congregate closeness of the living arrangements and the resulting relationships among the residents tend to generate an atmosphere of volatility. Incidents that would otherwise remain isolated are likely to erupt into more generalized violence and lead to feuds involving many residents who will carry persisting animosities. Indeed, to counter this potential for explosiveness the police carry beepers so that they are able to respond quickly to incidents occurring on these PHA premises.

There are different dangers to the health, safety and welfare of the residents in the PHA developments for senior citizens and the disabled but they, too, are real and unique. Many of the elderly residents suffer mental impairments. Many of the disabled are mentally disabled, and others are substance abusers. They frequently fail to take their prescribed medications. They frequently allow their acquaintances into the apartment complexes, many of whom, like their resident friends, have mental or emotional problems. The result is a lack of responsibly controlled behavior that gives rise to assault, vandalism, rowdyism and similar disturbances in these developments for senior citizens and disabled persons.

On the basis of testimony the court accepts as credible and reliable, the court further finds as fact that in the above-described circumstances the availability of firearms, as instrumentalities with lethal potential, would aggravate the dangers to the health, safety and welfare of the PHA residents by making more likely the occurrence of serious injuries or deaths.

Even if, to date, incidents involving firearms at the PHA projects have been few, perhaps because of deterrent effects of the firearms ban--although the court does not so find as fact--reasonableness in regulation does not require that the PHA postpone the prohibition of firearms availability until greater, or more serious, firearm violence occurs. As the Law Court observed in *State v. Rush*, 324 A.2d 748, 753 (Me. 1974): "It is not necessary . . . to demonstrate that the actual evils persist." More cogently is this so when, as the court has

found, special circumstances now exist at the PHA premises in which the availability of firearms would lead to worsened conditions making more likely serious personal injury or death.

The plaintiff has argued that the ban on the possession of firearms has special impact on tenants in their homes, traditionally a haven of privacy. Plaintiffs say that the restriction's effect, therefore, is really to frustrate their enjoyment of the constitutionally guaranteed right to "keep" arms.

The argument is unpersuasive. PHA residents may own and keep firearms of any type so long as they are not possessed or displayed on PHA premises. Residents may still hunt, still target shoot, still collect firearms. The evidence shows, and the court finds, that residents have effectively found alternative places away from PHA premises to keep firearms they own or use. Although it is stipulated (as merely a generalized conclusion, it should be noted) that the plaintiffs lack wherewithal to keep their firearms elsewhere, this individualized burden to them is a hardship neither so extraordinary nor so oppressive as to defeat the demonstrated reasonableness of the firearms ban in promoting the general health, safety and welfare of the PHA residents. *Cf. id.* at 754-55.

The right to keep and bear arms, even if constitutionally protected, is not a "fundamental" constitutionally protected interest as to which governmental impingement will be subjected to "strict scrutiny". Accordingly, lesser restrictive means are not

requisite, *see*, *id.* at 754, and the wisdom of the choices made is not for the courts so long as there is, as here, a rational relationship between the means chosen and the protection of health, safety and welfare. *Brown*, 571 A.2d at 820.

It is thus apparent that, in the final analysis, the plaintiffs have failed to meet the ultimate burden of proof they bear, *see Central Maine Power Co. v. Waterville Urban Renewal Auth.*, 281 A.2d 233 (Me. 1971), to show that the PHA acted arbitrarily or capriciously in choosing to insert originally, and to continue presently to retain, in their leases the prohibition against the possession of firearms on PHA premises. More particularly, the plaintiffs have failed to meet their ultimate burden of proof to show that the PHA acted arbitrarily or capriciously in omitting to choose some other less intrusive restriction that would allow the plaintiffs to keep firearms in their home.

Based on all its findings of fact, the court's conclusion of law is that the provision in the plaintiffs' lease banning the possession or display of any firearm on PHA premises is a reasonable measure rationally related to advancing the health, safety and welfare of those residing in the PHA premises and, through them, of the public as a whole. It therefore is a permissible exercise of the public purpose powers the State of Maine has lawfully reposed in the PHA. As such, the lease provision does not violate the constitutional right of the plaintiffs to "keep and bear arms".

B. The Maine Constitutional Right to Defend Life and Liberty

Article I, Sec. 1 of the Constitution of Maine makes the "declaration" of a "natural, inherent and unalienable" right of "defending life and liberty". From this language the plaintiffs purport to construct a sweeping constitutional right to "self-defense" that would require each citizen to have ready access to a firearm, as the best means of "defending" one's "life and liberty".

The effort by the plaintiffs is unavailing. It has long been recognized that no violation of the "natural, inherent and unalienable" rights declared in Article I, Sec. 1 arises when there has been an otherwise lawful exercise of police power. *State v. Mayo*, 106 Me. 62, 75 A.2d 295 (1909); *State v. Phillips*, 107 Me. 249, 78 A.2d 283 (1910).

Hence, the definitive answer, here, derives from the court's prior discussion establishing that the PHA's firearms ban provision of the plaintiffs' lease is a lawful, because a rational, exercise of power that was lawfully delegated to the PHA, to provide for the health, safety and welfare of the PHA residents and, through them, of the public as a whole.

C. The Maine Constitution's Guarantee of Equal Protection of the Laws

Article I, Sec. 6-A of the Constitution of Maine says: "No person shall . . . be denied the equal protection of the laws". The plaintiffs contend that they are denied

this constitutional protection in that being persons of low income, they are deprived of the opportunity enjoyed by others to possess firearms where they live. The court rejects the contention, finding it fallacious.

The first element of fallacy is that the plaintiffs have confused happenstance with cause. True, it happens to be the case the PHA's imposed firearms ban affects only persons of low income since it is only persons of low income whose housing accommodations the PHA has the statutorily conferred power and responsibility to "manage, maintain and operate." It is not, however, because the plaintiffs are persons of low income that they are subjected to the ban on firearms. The cause, the reason, for the ban is the existence of conduct threatening the safety and security of the PHA premises and residents--without regard to whether low income status may, or may not, have had causal relation to that conduct. Thus, foundationally, the PHA has made no differentiation at all as to the plaintiffs on account or by reason of their low income status. Without any such differentiation there can be no invidious discrimination to be a violation of the equal protection of the laws. *Peters v. Saft*, 597 A.2d 50 (Me. 1991).

A second flaw in the plaintiffs' contention is that the PHA, as the governmental entity here under attack, not only has made no classification because of the low income status of the plaintiffs, but the PHA has itself made no classification at all relative to the low income status of the plaintiffs. That classification separating low income persons from others was made not by the PHA but by the State of Maine and the United States

Government in their statutes creating the PHA and delineating the scope of its powers and authority. It is to be stressed that in the exercise of its conferred powers the PHA has made no classification whatever among those subject to its control. It has imposed its lease provision banning the possession of firearms on PHA premises on all its tenants. If the result is that, thereby, the PHA tenants, including the plaintiffs, have been placed as [sic] a disadvantage (been made "unequal") relative to other persons, rich or poor, the PHA's creation of such inequality cannot be an invidious discrimination by it in violation of the equal protection of the laws. The reason is that it is the limitations imposed by the United States and the State of Maine on the scope and reach of the PHA's powers that produce the inequality, rather than any classification made by the PHA. *See*, *State v. Hayes*, 603 A.2d 869, 871 (Me. 1992).

In any event, the final deficiency defeating the plaintiffs' equal protection of the laws claim arises from the court's prior analysis showing that the firearms prohibition in the lease of the plaintiffs is a legitimate exercise by the PHA of its powers to promote health, safety and welfare. Let us assume that there is, here, a classification made by the PHA. As rationally related to promoting the health, safety and welfare of the PHA tenants, the firearms ban provision could not be an invidious discrimination insofar as those affected by it are person[s] of low income. Low income, or poverty, is not a "suspect" basis for classification (as is, for example, race, creed, color, or national origin). Thus, the court uses ordinary "rational relationship", rather than the more

stringent "strict scrutiny", mode of analysis to determine the validity of the classification made in the exercise of police power. *Peters v. Saft*, 597 A.2d 50.

In the present instance this means that the evidence must prove that the lease provision prohibiting the possession of firearms on PHA premises is arbitrary, as lacking rational relationship to the advancement of the public health, safety and welfare. *Swan v. Sohio Oil Co.*, 618 A.2d 214, 219 (Me. 1992). The evidence has shown just the opposite, as we have already discussed.

The lease provision at issue does not deny to the plaintiffs the equal protection of the laws.

ORDER

The Clerk shall enter on the docket of the court the following Judgment:

> As its Judgment the court declares that in the lease executed by the plaintiffs John Doe and Jane Doe and the defendant Portland Housing Authority the provision prohibiting the "possession of or display of a firearm upon the premises" and making a "violation . . . grounds for automatic termination of this Lease" is a legally valid provision which is enforceable against the plaintiffs.
>
> The requirement for such provision by the defendant Portland Housing Authority: (1) is a lawful exercise of powers lawfully delegated to the

defendant Portland Housing Authority by the State of Maine, (2) is activity lying outside the reach of the State's preemption, in 25 M.R.S.A. § 2011, of the regulation of firearms, as directed to "legislative" action by a "political subdivision" of the State, and (3) is constitutional insofar as it does not violate the guaranties in the Maine Constitution of (a) the right to keep and bear arms (Art. I, Sec. 16), (b) the right to defend life and liberty (Art. I, Sec. 1), or (c) the right to the equal protection of the laws (Art. I, Sec. 6-A).

DATED: December 29, 1993

/s/ Sidney W. Wernick
Sidney W. Wernick
Justice, Supreme Judicial Court, Active Retired, Sitting in the Superior Court

Plaintiff's Supplemental Memorandum,
December 17, 1993

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-92-1408

JOHN DOE and JANE DOE of Portland, County of Cumberland, State of Maine Plaintiffs	)
v.	) SUPPLEMENTAL) MEMORANDUM
PORTLAND HOUSING AUTHORITY a municipal corporation located in Portland, County of Cumberland, State of Maine Defendant	)

INTRODUCTION

The Plaintiffs, John Doe and Jane Doe by and through their attorney, Jeffrey W. Jones, Esquire hereby submit this supplemental memorandum in accordance with the Judge's instructions on specific issues raised at closing argument. Rather than reiterate and reargue all the issues once again, Plaintiffs would direct the court to review plaintiffs' memorandum and reply memorandum in support of their motion for summary judgment. This

memorandum, instead, will focus on the specific questions from the court raised during closing arguments as well as the issue the Court brought to the attention of the parties by telephone on December 15, 1993.

ARGUMENT

I. PORTLAND HOUSING AUTHORITY WAS NOT DELEGATED GENERAL POLICE POWERS BY THE LEGISLATURE AND, THEREFORE, IT DOES NOT HAVE THE AUTHORITY TO ENACT A TOTAL BAN ON THE POSSESSION OF FIREARMS.

* * *

II. IF THE COURT FINDS THAT THE PORTLAND HOUSING AUTHORITY DOES HAVE GENERAL POLICE POWERS TO MAKE ALL THE LAWS AND REGULATIONS WHICH THEY DEEM NECESSARY FOR THE PUBLIC HEALTH, MORALS, SAFETY AND WELFARE, THEN MAINE'S PREEMPTION LAW WOULD PRECLUDE SUCH ACTION.

If the court does find that the Housing Authority is an arm of government, or a political subdivision, then Maine's Preemption Law would be dispositive on this issue and nullify this ban on the possession of firearms. 25 M.R.S.A. § 2011. Under this Section, the State preempted the entire field of legislation concerning the regulation of firearms. Any existing order, ordinance,

rule, or regulation in this field of any political subdivision, including but not limited to, municipalities, counties, townships, and village corporations, regarding the ownership, use or possession of firearms is void. See, *Richmond Tenants v. Richmond Redevelopment and Housing Authority*, 751 F.Supp. 1204 (E.D.Va. 1990), where court found that Richmond Development and Housing Authority was a political subdivision of the Commonwealth of Virginia.

In conclusion, the Portland Housing Authority was not given explicit authority or power by the legislature to enact a ban on the possession of firearms. Even if the court finds that the Portland Housing Authority was given general police powers by the State to enact any and all regulations that they deemed to be necessary for the public's health, morals, safety and welfare then, then court will be finding that the Housing Authority is a political subdivision or a governmental entity which would fall within the purview of the State Preemption law. Significantly, Portland Housing Authority has stipulated at trial, as well as in their trial brief submitted to the court, that they are a "state actor". Under either scenario, the Portland Housing Authority Resolution and lease provision must be struck down.

III. **PORTLAND HOUSING AUTHORITIES RESOLUTION BANNING THE POSSESSION OF ALL TYPES OF FIREARMS DOES NOT HAVE THE PRESUMPTION OF CONSTITUTIONALITY.**

* * *

IV. **THE TOTAL BAN ON THE POSSESSION OF ALL FIREARMS IN ALL PORTLAND HOUSING AUTHORITY COMMUNITIES IS AN UNREASONABLE EXERCISE OF POLICE POWER.**

* * *

V. **A BAN ON THE POSSESSION OF FIREARMS IS A TOTAL BAN.**

* * *

VI. **THE PORTLAND HOUSING AUTHORITY BAN VIOLATES ARTICLE I, SECTION 6-A OF THE MAINE CONSTITUTION.**

* * *

CONCLUSION

* * *

Dated at Scarborough, Maine this 17th day of December, 1993.

/s/ Jeffrey W. Jones
Jeffrey W. Jones, Esquire
Attorney for Plaintiffs
John Doe and Jane Doe

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Defendant's Supplemental Memorandum, December 22, 1993

STATE OF MAINE
Cumberland, ss.

SUPERIOR COURT
Civil Action
Docket No. 92-1408

JOHN DOE and JANE DOE,	)	
Plaintiffs,	)	DEFENDANT'S SUPPLEMENTAL MEMORANDUM REGARDING STATE AND FEDERAL PREEMPTION ISSUES
v.	)	
PORTLAND HOUSING AUTHORITY	)	
Defendant.	)	

The Defendant Portland Housing Authority ("PHA") submits this memorandum in accordance with the Court's request regarding the preemptive effect, if any, of State law, 25 M.R.S.A. § 2011 (West Supp. 1992), on the PHA's power to ban the possession and display of firearms by its tenants on its premises.[1] The PHA (1) maintains that Section 2011 was not intended by the Legislature to preempt the PHA's authority to exercise its duties to operate safe dwellings for the benefit of its tenants through a ban on firearms included in its lease

1. The other concern raised during the December 17, 1993 chambers conference, regarding compliance with M.R. Civ. P. 80B, has been addressed by stipulation of the parties.

provisions; and (2) respectfully submits that if the Court should view State law as potentially preemptive, that that State law itself is preempted by federal law.[2]

ARGUMENT

I. Plaintiff Should Not Be Allowed to Raise New Legal Theories at This Late Stage of the Litigation.

PHA reiterates its objection stated orally to the Court on December 17, 1993, that Plaintiffs should not be allowed to raise, at this late date, after the close of evidence, new legal theories with which to attack the legality of the PHA Lease Provision. Plaintiffs are the masters of their complaint; they have chosen to litigate the constitutional issues in regard to the Lease Provision, and have never raised any arguments regarding State preemption until their memorandum of December 17, 1993. They should not now be allowed basically to amend their complaint and raise these issues anew at this time. *McLain v. Training & Development Corp.*, 572 A.2d 494, 498 (Me. 1990).

---

2. With this memorandum, the PHA submits the affidavit of Peter Howe, Executive Director of the PHA. As explained below, the affidavit supplements Mr. Howe's trial testimony in regard to the PHA's obligations to the federal government. Given that the Court has allowed Plaintiffs to raise their state law preemption attack after trial, the Defendant PHA respectfully requests that it be allowed to supplement the record in order to support its defense to the Plaintiffs new legal theory.

Defendant's Supplemental Memorandum, December 22, 1993

II. The Legislature Did Not Intend to Prevent Housing Authorities From Exercising Their Discretion to Fashion Lease Provisions to Regulate Firearms in Their Housing Projects.

* * *

III. The Legislative History of Section 2011 Reveals That the Legislature Did Not Intend to Take Away From Housing Authorities Their Ability to Fashion Lease Provisions In Order to Promote the Health and Social Well-Being of Their Tenants.

* * *

IV. If Section 2011 Does Apply to the Housing Authority, Federal Law Preempts It.

Should the Court determine that the PHA lease provision falls under the preemptive scope of Section 2011, the PHA respectfully submits that federal law preempts that State law.[9] As noted by Mr. Howe at trial and in his affidavit, the PHA receives federal funds for

---

9. Peter Howe, the executive director of the PHA, testified at trial to the connection between the PHA and the federal government. Basically, the United States funds, through various means, each of the ten housing projects under the PHA's control. The PHA respectfully requests, however, that in addition to Mr. Howe's testimony, the PHA be allowed to supplement that testimony with an affidavit, which would set before the Court some additional facts regarding the PHA's relationship to the federal government and the terms of the Consolidated Annual Contribution Contract ("CACC") between the PHA and the United States. A copy of the CACC is attached as Exhibit A to the Howe Affidavit.

each of its ten housing projects under the Housing Act of 1937 (42 U.S.C.A. § 1404a *et seq.*) (West 1978 & Supp. 1992) (the "Act"). That Act provides that the federal government funds are to be used to assist in the provision of "decent, safe, and sanitary dwellings . . . and . . . to vest in local public housing agencies the maximum amount of responsibility in the administration of their housing programs." 42 U.S.C.A. § 1437 (West Supp. 1992). Furthermore, management practices (including, one would infer, lease provisions) are to be implemented to help "assure that satisfactory standards of tenant security . . . are formulated and that the public housing agency . . . enforces those standards fully and effectively." 42 U.S.C.A. § 1437d(c)(4)(C) (West Supp. 1992).

Indeed, Congress mandates that "[e]ach public housing agency shall utilize leases which (1) do not contain unreasonable terms and conditions; (2) obligate the public housing agency to maintain the project in a decent, safe, and sanitary condition," and expressly provides that the housing authority may terminate a resident's tenancy for criminal conduct. 42 U.S.C.A. § 1437d(l) (West Supp. 1992).

Congress' desire to provide safe housing means more than mere structural soundness, but also applies to tenant conduct, and the ability to regulate tenant conduct to help insure the safety of the project. See, e.g., 24 C.F.R. §§ 966.4(e)(1), 966.4(f)(11) & (12) (April 1993) (tenant obligated to conduct himself in a peaceful manner, conducive to maintaining a safe project). The phrases "decent, safe, and sanitary" and "physical or social

environment" have been defined to include not only the structural soundness of facilities but also freedom from violence. *E.g., P.L.C. v. Housing Authority of County of Warren*, 588 F. Supp. 961, 965 (W.D. Pa. 1984); *Spence v. Gormley*, 439 N.E.2d 741, 744-45 (Mass. 1982).

Under its agreements with the United States (the "CACC"), the PHA is contractually mandated by the federal government to operate its projects in compliance with the CACC and federal law. CACC, Part I, § 4. The PHA is obligated to use the money provided by the federal government to provide safe and decent housing to its residents. CACC, Part I, § 6. Section 201 of Part II of the CACC provides:

> The Local Authority [the PHA] shall at all times operate each Project (1) solely for the purpose of providing decent, safe and sanitary dwellings (including necessary appurtenances thereto) within the financial reach of Families of Low Income, (2) in such manner as to promote serviceability, efficiency, economy and stability, and (3) in such manner as to achieve the economic and social well-being of the tenants thereof.

Accord CACC, Part II, § 101. Moreover, Section 203 of Part II of the CACC specifically provides that the PHA "shall not permit any family to occupy a dwelling in any project except pursuant to our written lease . . . which lease shall contain all relevant provisions necessary to meet the requirements of the Act and of this Contract. . . ." CACC, Part II, § 203(B). The federal

government has, therefore, imposed on the PHA the affirmative duty to operate its housing projects in a safe manner to achieve the economic and social well-being of its tenants. *See, e.g.*, 42 U.S.C.A. §§ 1437c & 1437g (West 1978 & Supp. 1992); *Henry Horner Mothers Guild v. Chicago Housing Authority*, 780 F. Supp. 511, 512, 515-16 (N.D. Ill. 1993) (housing authority must maintain project to keep it safe pursuant to CACC; here, part of tenants' complaints concerned vandals, trespassers, and drug dealers); *Concerned Tenants Association of Father Panik Village v. Pierce*, 685 F. Supp. 316, 323-24 (D. Conn. 1988) (the CACC requires that the housing authority provide decent, safe and sanitary housing; the language of the Housing Act and its legislative history demonstrate that Congress intended that the regulatory contracts entered into pursuant to the Act were designed to benefit the tenants as a mechanism for insuring they receive decent and safe housing).

Under federal law, regulations, and contract, the PHA is obligated to operate and manage its projects to promote safety, stability, and the social well-being of its tenants. Section 2011, if applicable, removes any discretion from the PHA in its ability to achieve these goals and to manage its projects to provide safe housing in relation to the presence of firearms in its projects. The Supremacy Clause of the United States Constitution, Art. VI, § 2, provides that the federal Constitution, law and treaties "shall be the supreme law of the land[.]" Federal law, therefore, preempts state law which conflicts with it. The Supreme Court has determined that a state conflicts with federal law when compliance with both state and federal law is impossible or when the state law "stands as

an obstacle" to the accomplishment and execution of the full purposes and objectives of Congress. *Mich. Canners & Freezers Ass'n, Inc. v. Agr. Marketing & Barg. Bd.*, 467 U.S. 461, 469, 104 S.Ct. 2518, 81 L.Ed.2d 399 (1984) (citations omitted); *accord Bayside Enterprises, Inc. v. Maine Agr. Barg. Bd.*, 513 A.2d 1355, 1358-59 (Me. 1986). Here, if Section 2011 is interpreted to apply to the PHA and to remove from the PHA any authority to determine how to deal effectively with the dangers posed by the presence of firearms in its projects, that State law "stands as an obstacle" to the accomplishment and execution of the full purposes and objectives of Congress in creating and funding public housing projects like the PHA and is, therefore, preempted under federal law.

CONCLUSION

The Portland Housing Authority respectfully submits that the Legislature did not intend, by enacting Section 2011, to remove from local housing authorities the ability to regulate tenant conduct in relation to the presence of firearms in local housing projects. The legislative history of Section 2011 bears out that the dangers primarily on the minds of those who passed Section 2011 do not, in any way, concern the lease provision at issue here. To the extent, however, that Section 2011 is found to apply, federal law preempts that State law.

In brief, the Portland Housing Authority contends that its Lease Provision banning the possession and display of firearms is, indeed, constitutional, and that the PHA's authority to manage and operate its projects in relation to

the presence of firearms on its premises is not preempted by State law.

Respectfully submitted this 22nd day of December, 1993.

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Portland Housing Authority Brief to Maine Supreme Judicial Court dated June 2, 1994

STATE OF MAINE
Cumberland, ss.

SUPREME JUDICIAL COURT
Sitting as the Law Court
Law Docket No. CUM-94-188

JOHN DOE and JANE DOE

Plaintiffs/Appellants

v.

PORTLAND HOUSING AUTHORITY

Defendant/Appellee

On Appeal from the Cumberland County Superior Court

BRIEF OF DEFENDANT/APPELLEE PORTLAND HOUSING AUTHORITY

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* * *

V.

IF SECTION 2011 DOES APPLY TO THE HOUSING AUTHORITY, FEDERAL LAW PREEMPTS IT.

Should the Court determine that the PHA lease provision falls under the preemptive scope of Section 2011, the PHA respectfully submits that federal law preempts that State law.[10] As noted by Mr. Howe at trial and in his affidavit submitted to the Court, the PHA receives federal funds for each of its ten housing projects under the Housing Act of 1937 (42 U.S.C.A. § 1404a *et seq.*) (West 1978 & Supp. 1992) (the "Act"). That Act provides that the federal government funds are to be used to assist in the provision of "decent, safe, and sanitary dwellings . . . and . . . to vest in local public housing agencies the maximum amount of responsibility in the administration of their housing programs." 42 U.S.C.A. § 1437 (West Supp. 1992). Furthermore, management

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10. Peter Howe, the executive director of the PHA, testified at trial about the connection between the PHA and the federal government. Basically, the United States finances, through various means, each of the ten housing projects under the PHA's control. In addition to Mr. Howe's testimony, the PHA was allowed to supplement his testimony with an affidavit, which is part of the record on appeal, establishing additional facts regarding the PHA's relationship to the federal government and the terms of the Consolidated Annual Contribution Contract ("CACC") between the PHA and the United States.

practices (including, one would infer, lease provisions) are to be implemented to help "assure that satisfactory standards of tenant security . . . are formulated and that the public housing agency . . . enforces those standards fully and effectively." 42 U.S.C.A. § 1437d(c)(4)(C) (West Supp. 1992).

Indeed, Congress mandates that "[e]ach public housing agency shall utilize leases which (1) do not contain unreasonable terms and conditions; (2) obligate the housing agency to maintain the project in a decent, safe, and sanitary condition," and the statute expressly provides that the housing authority may terminate a resident's tenancy for criminal conduct. 42 U.S.C.A. § 1437d(1)(1),(2),(5) (West Supp. 1992).

Congress' desire to provide safe housing means more than mere structural soundness, but also applies to tenant conduct, and the ability to regulate tenant conduct to help insure the safety of the project. *See, e.g.*, 24 C.F.R. §§ 966.4(e)(1), 966.4(f)(11) & (12) (April 1993) (tenant obligated to conduct himself in a peaceful manner, conducive to maintaining a safe project). The phrases "decent, safe, and sanitary" and "physical or social environment" have been defined to include not only the structural soundness of facilities but also freedom from violence. *E.g., P.L.C. v. Housing Authority of County of Warren*, 588 F. Supp. 961, 965 (W.D. Pa. 1984); *Spence v. Gormley*, 439 N.E.2d 741, 744-45 (Mass. 1982).

Under its agreements with the United States (the "CACC"), the PHA is contractually mandated by the

federal government to operate its projects in compliance with the CACC and federal law. CACC, Part I, § 4. The PHA is obligated to use the money provided by the federal government to provide safe and decent housing to its residents. CACC, Part I, § 6. Section 201 of Part II of the CACC provides:

> The Local Authority [the PHA] shall at all times operate each Project (1) solely for the purpose of providing decent, safe and sanitary dwellings (including necessary appurtenances thereto) within the financial reach of Families of Low Income, (2) in such manner as to promote serviceability, efficiency, economy and stability, and (3) in such manner as to achieve the economic and social well-being of the tenants thereof.

Accord CACC, Part II, § 101. Moreover, Section 203 of Part II of the CACC specifically provides that the PHA "shall not permit any family to occupy a dwelling in any project except pursuant to our written lease . . . which lease shall contain all relevant provisions necessary to meet the requirements of the Act and of this Contract. . . ." CACC, Part II, § 203(B). The federal government has, therefore, imposed on the PHA the affirmative duty to operate its housing projects in a safe manner to achieve the economic and social well-being of its tenants. *See, e.g.*, 42 U.S.C.A. §§ 1437c & 1437g (West 1978 & Supp. 1992); *Henry Horner Mothers Guild v. Chicago Housing Authority*, 780 F. Supp. 511, 512, 515-16 (N.D. Ill. 1991) (housing authority must maintain project to keep it safe pursuant to CACC; here, part of tenants' complaints concerned vandals, trespassers, and drug

dealers); *Concerned Tenants Association of Father Panik Village v. Pierce*, 685 F. Supp. 316, 323-24 (D. Conn. 1988) (the CACC requires that the housing authority provide decent, safe and sanitary housing; the language of the Housing Act and its legislative history demonstrate that Congress intended that the regulatory contracts entered into pursuant to the Act were designed to benefit the tenants as a mechanism for insuring they receive decent and safe housing).

Under federal statutes, regulations, and contract, the PHA is obligated to operate and manage its projects to promote safety, stability, and the social well-being of its tenants. But the Maine statute, Section 2011, if applicable, removes any discretion from the PHA in its ability to achieve these goals and to manage its projects to provide safe housing in relation to the presence of firearms in its projects. The Supremacy Clause of the United States Constitution, Art. VI, § 2, provides that the federal Constitution, law, and treaties "shall be the supreme law of the land[.]" Federal law, therefore, preempts state law which conflicts with it. The U.S. Supreme Court has determined that there is a conflict between state and federal law when compliance with both state and federal law is impossible or when the state law "stands as an obstacle" to the accomplishment and execution of the full purposes and objectives of Congress. *Mich. Canners & Freezers Ass'n, Inc. v. Agr. Marketing & Garg. Bd.*, 467 U.S. 461, 469, 104 S.Ct. 2518, 81 L.Ed.2d 399 (1984) (citations omitted); *accord Bayside Enterprises, Inc. v. Maine Agr. Barg. Bd.*, 513 A.2d 1355, 1358-59 (Me. 1986). Here, if Section 2011 is interpreted to apply to the PHA and to remove from the

PHA any authority to determine how to deal effectively with the dangers posed by the presence of firearms in its projects, Section 2011 "stands as an obstacle" to the accomplishment and execution of the full purposes and objectives of Congress in creating and funding public housing projects like the PHA and is, therefore, preempted by federal law. The authority of the PHA to enter into and enforce the lease provision against the Appellants is beyond question under federal law.

CONCLUSION

For the reasons stated, it is respectfully requested that the Decision of the Superior Court be affirmed.

Dated: June 2, 1994

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Roy S. McCandless
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42 U.S.C. § 1437

42 U.S.C. § 1437

§ 1437. Declaration of policy

It is the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this chapter to assist the several States and their political subdivisions to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of lower income and, consistent with the objectives of this chapter, to vest in local public housing agencies the maximum amount of responsibility in the administration of their housing programs. No person should be barred from serving on the board of directors or similar governing body of a local public housing agency because of his tenancy in a low-income housing project.

42 U.S.C. § 1437d(c)

42 U.S.C. § 1437d(c)

(c) Revision of maximum income limits; certification of compliance with requirements; notification of eligibility; informal hearing; compliance with procedures for sound management

Every contract for contributions shall provide that--

(4) the public housing agency shall comply with such procedures and requirements as the Secretary may prescribe to assure that sound management practices will be followed in the operation of the project, including requirements pertaining to-

(C) the establishment of effective tenant-management relationships designed to assure that satisfactory standards of tenant security and project maintenance are formulated and that the public housing agency (together with tenant councils where they exist) enforces those standards fully and effectively;

42 U.S.C. § 1437d(1)

42 U.S.C. § 1437d(l)

(l) Leases; terms and conditions; maintenance; termination

Each public housing agency shall utilize leases which-

(1) do not contain unreasonable terms and conditions;
(2) obligate the public housing agency to maintain the project in a decent, safe, and sanitary condition;
(3) require the public housing agency to give adequate written notice of termination of the lease which shall not be less than-
(A) a reasonable time, but not to exceed 30 days, when the health or safety of other tenants or public housing agency employees is threatened;
(B) 14 days in the case of nonpayment of rent; and
(C) 30 days in any other case;
(4) require that the public housing agency may not terminate the tenancy except for serious or repeated violation of the terms or conditions of the lease or for other good cause;
(5) provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or near such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under

the tenant's control, shall be cause for termination of tenancy; and

24 C.F.R. § 960.204

24 C.F.R. § 960.204

[e]ach PHA shall adopt and implement policies and procedures embodying standards and criteria for tenant selection which take into consideration ... the statutory purpose in developing and operating ... public housing projects which provide ... a suitable living environment", and the policies and procedures "must be designed to ... [p]reclude admission of applicants whose habits and practices reasonably may be expected to have a detrimental effect on ... the project environment.

24 C.F.R. § 966.4

24 C.F.R. § 966.4

§ 966.4 Lease requirements.

A lease shall be entered into between the PHA and each tenant of a dwelling unit which shall contain the provisions described hereinafter.

* * *

(e) *The PHA's obligations.* The lease shall set forth the PHA's obligations under the lease which shall include the following:

(1) To maintain the dwelling unit and the project in decent, safe and sanitary condition;

(2) To comply with requirements of applicable building codes, housing codes, and HUD regulations materially affecting health and safety;

* * *

(f) *Tenant's obligations.* The lease shall provide that the tenant shall be obligated:

* * *

(4) To abide by necessary and reasonable regulations promulgated by the PHA for the benefit and well-being of the housing project and the tenants which shall be posted in the project office and incorporated by reference in the lease;

* * *

24 C.F.R. § 966.4

(11) To act, and cause household members or guests to act, in a manner which will not disturb other residents' peaceful enjoyment of their accommodations and will be conducive to maintaining the project in a decent, safe and sanitary condition;

(12)(i) To assure that the tenant, any member of the household, a guest, or another person under the tenant's control, shall not engage in:

(A) Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the PHA's public housing premises by other residents or employees of the PHA or

(B) Any drug-related criminal activity on or near such premises.

Any criminal activity in violation of the preceding sentence shall be cause for termination of tenancy, and for eviction from the unit.

Consolidated Annual Contributions Contract Part I

Sec. 4. Covenant To Develop and Operate

The Local Authority shall develop each Project being or to be developed and shall operate all Projects covered by this Contract in compliance with all provisions of this Contract and all applicable provisions of the Act.

Sec. 6. Justification for Projects and Financial Assistance by PHA

The Local Authority has demonstrated to the satisfaction of the PHA that there is a need for such low-rent housing which is not being met by private enterprise. The development and operation of each Project in accordance with this Contract will provide decent, safe, and sanitary dwellings within the financial reach of families who are in the lowest income group and who cannot afford to pay enough to cause private enterprise in this locality or metropolitan area to build an adequate supply of decent safe, and sanitary dwellings for their use (which families are herein called "Families of Low Income"), and the provisions of this Contract are adequate to assure that each such Project will be developed and operated in compliance with all the requirements of the Act. The loan herein provided is necessary to assist the development of each Project, and the annual contributions payable by the PHA in the amounts, for the period, and in the manner herein provided are necessary to achieve, maintain, and assure the low-rent character of each such Project.

CACC Part II

Consolidated Annual Contributions Contract Part II

Sec. 101. Efficiency and Economy in Development and Administration

Each project shall be undertaken in such a manner that it will not be of elaborate or extravagant design or materials, and will be developed and administered to promote serviceability, efficiency, economy, and stability and to achieve the economic and social well-being and advancement of the tenants thereof.

* * *

Sec. 201. Use of Projects

The Local Authority shall at all times operate each Project (1) solely for the purpose of providing decent, safe, and sanitary dwellings (including necessary appurtenances thereto) within the financial reach of Families of Low Income (2) in such manner as to promote serviceability, efficiency, economy, and stability, and (3) in such manner as to achieve the economic and social well-being of the tenants thereof.

* * *

Sec. 203. Leases

(A) The Local Authority shall, unless otherwise approved by the Government, use the dwellings in the Projects solely for the purpose of housing Families of Low Income as provided in this Contract. It shall not, without the approval of the Government, grant any

concessions, licenses, or permits to use any nondwelling space or facility in any Project at less than fair rental value, except for programs conducted by or primarily for the occupants of the Project or for temporary public, charitable, or similar use.

(B) The Local Authority shall not permit any family to occupy a dwelling in any Project except pursuant to a written lease for such dwelling executed by a responsible member of such family, which lease shall contain all relevant provisions necessary to meet the requirements of the Act and of this Contract, and which lease shall provide that the Local Authority shall not terminate the tenancy other than for violation of the terms of the lease or other good cause. In terminating a tenancy, the Local Authority shall inform the tenant in a private conference or other appropriate manner the reasons for the eviction and give the tenant an opportunity to make such reply or explanation as he may wish.

25 M.R.S.A. § 2011

ME. STAT. REV. ANN. Tit. 25, § 2011

1. Preemption. The State intends to occupy and preempt the entire field of legislation concerning the regulation of firearms, components, ammunition and supplies. Except as provided in subsection 3, any existing or future order, ordinance, rule or regulation in this field of any political subdivision of the State is void.

2. Regulation restricted. Except as provided in subsection 3, no political subdivision of the State, including, but not limited to, municipalities, counties, townships and village corporations, may adopt any order, ordinance, rule or regulation concerning the sale, purchase, purchase delay, transfer, ownership, use, possession, bearing, transportation, licensing, permitting, registration, taxation or any other matter pertaining to firearms, components, ammunition or supplies.

3. Exception. This section does not prohibit an order, ordinance, rule or regulation of any political subdivision which, with the exception of appropriate civil penalty provisions, conforms exactly with any applicable provision of state law or which regulates the discharge of firearms within a jurisdiction.

4. Law enforcement agency. Nothing in this section limits the power of any law enforcement agency to regulate the type and use of firearms issued or authorized by that agency for use by its employees. For the purposes of this section "law enforcement agency" has the same meaning as set forth in section 3701.

(2)

No. 95-15

Supreme Court, U.S.
FILED
AUG 1 1995
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

PORTLAND HOUSING AUTHORITY,
Petitioner

v.

JOHN DOE and JANE DOE,
Respondents

On Petition for Writ of Certiorari to the Supreme Judicial Court of Maine

---

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

In the opinion of the Respondent, the following question is presented:

Do federal laws requiring a local public housing authority to provide decent, safe, and sanitary housing to its residents preempt a state firearm preemption law which voids a lease provision banning the possession or display of a firearm on public housing authority property by tenants?

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U.S. Department of Justice, Bureau of Justice Statistics, *Criminal Victimization in the United States, 1992*, NCJ 145125 (Washington, D.C.: U.S. Department of Justice, 1994) 8

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-15

PORTLAND HOUSING AUTHORITY,
Petitioner

v.

JOHN DOE and JANE DOE,
Respondents

On Petition for Writ of Certiorari to the Supreme Judicial Court of Maine

---

RESPONDENT'S BRIEF IN OPPOSITION

The Respondents, John and Jane Doe, by and through their attorneys, respectfully submit that the Supreme Court should deny the Petition for *certiorari* because the case was properly decided as a matter of state law and that the Court does not have jurisdiction under 28 U.S.C. § 1257(a).

OPINION BELOW

The decision of the Maine Supreme Judicial Court in this case has been reported at 656 A.2d 1200 (Me. 1995).

STATEMENT OF JURISDICTION

Just as alchemists of old sought to change lead into gold by intoning a few magic words, so too does Petitioner seek to invoke the jurisdiction of the court under 28 U.S.C. § 1257(a) by re-characterizing the nature of this case from a simple matter of state contract law by wrongly asserting that "the validity of a state law is

drawn into question on the grounds of its being repugnant to the Constitution, treaties or laws of the United States and, correspondingly, a title, right, privilege, or immunity is claimed under authority exercised pursuant to the Constitution and statutes of the United States." In fact, it is only Petitioner's illogical reading of the *Housing Act of 1937* that has drawn the validity of the Maine firearm preemption statute [1] into question.

The holding of Maine's Supreme Judicial Court is clear and succinct:

> "Because we conclude that the PHA is a political subdivision within the meaning of 25 M.R.S.A. § 2011 (Supp. 1994), the lease provision, which is based on a resolution enacted by the PHA in 1975, is preempted by section 2011. Accordingly, we vacate the judgment without reaching the [state] constitutional issues advanced by the Does." *Doe, supra,* 656 A.2d at 1201.

Contrary to Petitioner's assertion, Respondents dispute that this holding invalidates "a state law [2] as being repugnant to the Constitution, treaties or laws of the United States," and, therefore, no title, right, privilege or immunity conceivably held by the Petitioner is called into question. For that reason, the Court should deny the Petitioner's petition for a writ of *certiorari* as failing the requisite requirements for jurisdiction under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

The following facts were found by the Maine Supreme Judicial Court. The Public Housing Authority (PHA) is a municipal housing authority created pursuant to 30-A M.R.S.A. § 4721 (Pamph. 1994). In 1975, the PHA Board of Commissioners passed a resolution prohibiting

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[1] 25 M.R.S.A. § 2011 (Supp. 1994).

[2] The holding of the Maine Supreme Judicial Court invalidated a lease provision prepared by the Public Housing Authority—a municipal corporation. It did not invalidate any state law.

tenants from possessing firearms on PHA property. The firearms ban provision is a provision in the leases of all PHA tenants.[3] The Does are married and live in Sagamore Village, a PHA development. They have lived in PHA housing since 1981. John Doe is a veteran of the United States Marine Corps, a former federally licensed firearms dealer, and a licensed hunter in Maine. He works nights, and when he is away, Jane, who has used handguns for twenty-seven years and target shoots at a gun club, is fearful for her safety. In violation of the lease agreement, they own and possess hunting rifles and handguns. To remain in their home without the threat of having their lease terminated, the Does brought a declaratory judgment action seeking, *inter alia*, a declaration that the firearms ban in their lease is contrary to the Maine Constitution and therefore is void and unenforceable, and that the lease is preempted by state law regulating firearms.

The trial court found that the lease provision does not violate the sections of the Maine Constitution relied on by the Does: the right to keep and bear arms,[4] the right to defend life and liberty,[5] or the right to equal protection of the laws.[6] The court also concluded that the ban on the possession of firearms is not preempted by state law and, therefore, upheld the lease provision and denied the Does any relief. The Does appealed to the Maine Supreme Judicial Court which reversed and remanded, finding specifically:

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[3] The Does' lease agreement with PHA provides, "The Tenant's possession of or display of a firearm upon the premises is prohibited. A violation of this Section is grounds for automatic termination of this Lease."

[4] Me. Const. art. I, § 16.

[5] Me. Const. art. I, § 1.

[6] Me. Const. art. I, § 6-A.

> "Because we conclude that the PHA is a political subdivision within the meaning of 25 M.R.S.A. § 2011 (Supp. 1994), the lease provision, which is based on a resolution enacted by the PHA in 1975, is preempted by section 2011. Accordingly, we vacate the judgment without reaching the [state] constitutional issues advanced by the Does." *Doe, supra,* 656 A.2d at 1201.

This Petition for a writ of *certiorari* followed.

SUMMARY OF ARGUMENT

The petition alleges that the Maine preemption law (25 M.R.S.A. § 2011 (Supp. 1994)) is in conflict with, and superseded by the *Housing Act of 1937* (42 U.S.C.A. § 1404, *et seq.*) as that statute has been implemented by rules and regulations promulgated by the Department of Housing and Urban Development (HUD). Certain of these provisions are found at 24 C.F.R. §§ 960.204, and 966.4 (April, 1994).

Respondents submit that there is no conflict between the federal and state statutes, and furthermore, that the Congress never intended the *Housing Act of 1937* to become a vehicle to thwart the rights of states to pass on the question of firearms regulation as a matter of state law concern. Indeed, recent legislative enactments by the Congress make clear that not only has the Congress specifically disclaimed the authority to preempt state firearms laws,[7] but it has also vested even juveniles with the right to keep firearms in the home.[8]

Finally, to the extent that the Petitioner relies on the *Housing Act of 1937* as authority for the PHA to enforce federal mandates to "provide decent, safe, and sanitary housing to its residents," such reliance is misplaced. Where a federal interest is sufficiently strong enough to

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[7] 18 U.S.C. § 927.

[8] 18 U.S.C. § 922(x)(3)(D); section 110201 of the *Violent Crime Control and Law Enforcement Act of 1994.*

cause Congress to legislate, it must do so directly; it may not conscript state governments [or their political subdivisions] as its agents. *New York v. United States,* 112 S.Ct. 2408, 2429 (1992).

Respondents urge that this case was correctly disposed of by the Maine Supreme Judicial Court under applicable state law. Consequently, this Court need not, and should not, resort to a convoluted reading of the *Housing Act* in order to search out a federal right where none is needed to resolve the controversy.

ARGUMENT

As correctly noted in the opinion below, a federal statute—such as the *Housing Act of 1937*—preempts a state law only when Congress has explicitly stated its intention to preempt state regulation of a certain field. *Doe, supra* 656 A.2d at 1202, citing *Rozanski v. A-P-A Transp., Inc.,* 512 A.2d 335, 339 (Me. 1986), (quoting *Michigan Canners & Freezers Ass'n, Inc. v. Agricultural Mktg. & Bargaining Bd.,* 467 U.S. 461, 468, 104 S.Ct. 2518, 2522, 81 L.Ed.2d 399 (1984)). Nowhere in the *Housing Act of 1937* does Congress manifest an intent to preempt state regulation of public housing, and certainly the *Housing Act* does not indicate any intent on the part of Congress to exclusively occupy the field of firearms regulation.

Indeed, where Congress *has* regulated firearms (*e.g.,* pursuant to the *Gun Control Act of 1968,*[9] as amended), it has specifically *disclaimed* an intent to preempt state law:

> § 927. Effect on State Law. No provision of this chapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter,

[9] 18 U.S.C. § 921, *et seq.*

> unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together. 18 U.S.C. § 927.

In addition, when Congress undertook to pass the *Firearms Owners' Protection Act of 1986,* (amending the *Gun Control Act*) it specifically included a declaration of legislative intent that "additional legislation is required to reaffirm the intent of the Congress, as expressed in section 101 of the *Gun Control Act of 1968,* that 'it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap-shooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes.'" Pub. L. No. 99-308 (1986).

Simply put, Congress has never indicated any expressed or implied desire to preempt state regulation of firearms—either in the *Housing Act of 1937,* the *Gun Control Act of 1968,* or in any other federal statute. Thus, the Maine legislature had every right under its sovereign police power to enact statewide preemption as a matter of establishing and expressing that state's public policy on firearms and nothing in any federal statute supports the proposition that it is beyond the power of the Maine legislaure to do so. Certainly if the *Gun Control Act* does not establish federal preemption, the *Housing Act* most assuredly cannot be stretched to read to do so.

It appears that Petitioner is simply attempting to play the *Housing Act* as a federal "trump card" in an effort to circumvent the clear language of the state preemption statute which forbids political subdivisions of the State—including the PHA—from imposing localized firearms regulations. Such an attempt to stretch the powers dele-

gated to the states under the *Housing Act* would require that this Court undertake a reading of the Act which is not supported by the clear language of the statute.

Likewise, Petitioner claims the offending lease provision was adopted in the furtherance of a federal mandate to provide "decent, safe, and sanitary housing," and thus, that the lease provision is somehow, therefore, a manifestation of the will of Congress. Interestingly, however, just last year Congress specifically provided authority for even juveniles to possess firearms in the home for self-defense. Subtitle B (Youth Handgun Safety) of Title XI of the *Violent Crime Control and Law Enforcement Act of 1994* (*i.e.*, the "crime bill") prohibits the possession of a handgun or ammunition by, or the private transfer of a handgun or ammunition to, a juvenile. Exceptions to the general prohibition include "the possession of a handgun or ammunition by a juvenile taken in defense of the juvenile or other persons against an intruder into the residence of the juvenile or a residence in which the juvenile is an invited guest." It would be strange, indeed, that Congress would expressly authorize all juveniles to possess firearms in the home under the provisions of the crime bill, while simultaneously allowing a local government to use the *Housing Act* to cloak itself in federal authority to ban whole classes of low-income adults from possessing firearms in their homes.

Finally, even Petitioner's factual underpinnings for promulgating the lease provision in the first place are suspect. Several reasons support the proposition that firearms do not make a residence inherently dangerous, but rather provide a safe and effective means of self-defense. When properly handled, firearms pose no inherent risk of death or injury. According to the National Safety Council's 1993 *Accident Facts*, firearms were responsible for less than 2 percent of all accidental deaths—ranking just behind "suffocations caused by ingested objects" and "medical misadventures," and just ahead of "natural environ-

mental factors" and "poisonings caused by gases and vapors." In fact, since 1930 the number of annual fatal firearms accidents has decreased 56%,[10] while the number of privately owned guns has quadrupled and the U.S. population has doubled. Based on NSC data, one is almost twice as likely to die from a "medical misadventure" than from a firearm accident.[11]

Firearms in the home also provide a very real and credible deterrent to crime, and, consequently, Petitioner's claim that banning firearms from public housing authority property will make residents safer is unfounded. A 1994 study conducted by Florida State University criminologist Gary Kleck estimates that law-abiding citizens lawfully use firearms as many as 2.5 million times a year for protection from criminals or would-be criminals.[12] Furthermore, a Department of Justice sponsored survey of over 1,800 convicted felons found that 40% of felons chose not to commit at least one specific crime for fear that the victim was armed, and 34% admitted to being scared off or shot at by armed victims.[13] Finally, Department of Justice victimization surveys show that protective uses of firearms lessens the chance that rape, robbery and assault attempts will be successfully completed and reduces the chances of injury to the intended victim.[14] Thus, residents of PHA housing would be "safer" with firearms than without them.

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[10] *Accident Facts, 1993 Edition*, National Safety Council.

[11] *Accident Facts, supra.*

[12] Gary Kleck, Crime Control Through the Private Use of Armed Force, 35 Social Prob. 1 (Feb. 1988).

[13] Wright & Rossi, *Armed and Considered Dangerous, A Survey of Felons and Their Firearms*, p. 154 (Aldine de Gruyter, Hawthorne, NY, 1986).

[14] U.S. Department of Justice, Bureau of Justice Statistics, *Crimianl Victimization in the United States, 1992*, NCJ 145125, p. 86, table 77 (Washington, D.C.: U.S. Department of Justice, 1994).

CONCLUSION

When laid bare, this case amounts to nothing more than a simple contract case which certainly does not give rise to a jurisdictional claim under 28 U.S.C. § 1257(a). A lease provision has been invalidated, not a state statute.

The Supreme Judicial Court of Maine has found that as a matter of state law the Portland Housing Authority—as a municipal corporation created by the state—does not have authority to include a lease provision which bans the possession or display of firearms in the home by residents of public housing, and ordered that the offending provision be stricken from the leases of PHA tenants. Such a decision reflects a fair interpretation and application of Maine's firearm preemption law enacted as a matter of public policy by the Maine legislature.

The Portland Housing Authority, however, claims that federal law, namely the *Housing Act of 1937*, gives it the authority to completely disregard this expressed will of the state legislature and that the *Housing Act* further demands that the PHA ban firearms for the safety of public housing tenants. Such an assertion amounts to a gross display of paternal arrogance, and is not supported by either prior Congressional enactment or empirical evidence. If Congress wants to ban firearms from public housing projects, it must do so directly subject to the limitations identified by this Court in *United States v. Lopez*, 115 S.Ct. 1624 (1995). The fact that Congress has never indicated an intent or desire to preempt state firearms laws despite many forays into the field of firearms regulation, coupled with its pronouncement of less than a year ago that even juveniles have the right to possess firearms in the home, provides clear and ample evidence that Congress has not empowered the Portland Housing Authority to include this provision in its tenants' leases.

WHEREFORE, premises considered, Respondents pray that this Court will deny Petitioner the writ of *certiorari* to the Supreme Judicial Court of Maine.

Respectfully submitted.

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